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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED MAY 4, 1939.

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 162000

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

BILL OF COMPLAINT—Filed August 23, 1938

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Plaintiff, The Union Stock Yard and Transit Company of Chicago, a corporation, files this its bill of complaint against the United States of America, hereinafter called "United States," and the Interstate Commerce Commission, hereinafter called "Commission," to enjoin, set aside, annul and suspend a certain order of the Commission, as modified, and alleges:

1. Plaintiff, The Union Stock Yard and Transit Company of Chicago, is a corporation duly organized and existing under and by virtue of a special act of the Legislature of [fol. 4] the State of Illinois, and is a citizen of said state, and has and maintains its principal office in the City of Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and is a resident of the Northern District of Illinois, Eastern Division. Plaintiff is engaged in the business of conducting and operating a public stockyard in the City of Chicago known as Union Stock Yards. Plaintiff brings this suit in equity against the United States pursuant to an act of Congress approved October 22, 1913 known as Urgent Deficiency Appropriation Act (38 Stat. L. 219; 28 U. S. Code secs. 43-48), and said defendant is sued pursuant to express authority of the Congress of the United States in said act. The Commission is a commission exist-

ing under and by virtue of the Interstate Commerce Act (49 U. S. Code, secs. 1-27), and is specifically authorized and required by said act, among other things, to execute and enforce the provisions thereof. The order of the Commission, as modified, herein complained of was entered in a proceeding designated on the docket of the Commission as "Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago," upon a petition of certain railroad corporations and trustees of the properties of railroad corporations (some of which said railroad corporations and trustees reside in the Northern District of Illinois, Eastern Division) complaining of and protesting against a certain cancellation tariff of the plaintiff hereinafter described and asking that said tariff be suspended and, after hearing, be canceled.

2. Plaintiff owns, conducts and operates its said stockyard in said City of Chicago, and furnishes at said stockyard services and facilities in connection with the receiving, buying, selling, marketing, feeding, watering, holding, [fol. 5] delivery, shipment, weighing and handling of live stock transported by railroad trains and motor vehicles to and from said stockyard. Plaintiff's stockyard is approximately one mile in length and one-half mile in width, and plaintiff maintains and operates therein numerous pens, driveways, buildings, scales and other facilities used and useful in the operation of said stockyard, including platforms, chutes and pens which are used for unloading live stock from railroad cars and motor vehicles following the inbound movement of such live stock and for loading live stock into railroad cars and motor vehicles for outbound movement. Live stock is transported to and from said stockyard by the various trunk-line common carriers by railroad which serve said City of Chicago, and also by motor vehicles.

Some time shortly after August 15, 1921 the Secretary of Agriculture gave notice to the plaintiff that said stockyard came within the definition of a stockyard as defined in Section 302 of the Packers and Stockyards Act, 1921 (7 U. S. Code sec. 202), and gave public notice thereof by posting copies of such notice to plaintiff in said stockyard. The Secretary of Agriculture has at no time since the giving of said notice to plaintiff and the public given any like notice that said stockyard was or is no longer within said definition, and plaintiff's said stockyard at all times since

the giving of said notice to plaintiff and the public in the year 1921 has been, and still is, a stockyard subject to the provisions of the Packers and Stockyards Act, 1921 (7 U. S. Code secs. 201-229). Pursuant to the requirements of said act plaintiff, since to-wit, December 30, 1921, has had on file, and still has on file, with the Secretary of Agriculture, and in full force and effect, schedules stating its [fol. 6] rates and charges for various stockyard services as defined in Section 301 of said act (7 U. S. Code sec. 201) furnished by plaintiff at its said stockyard, except the services of loading and unloading live stock for railroads.

3. Inbound carloads of live stock consigned to consignees at said stockyard by rail are transported by the various trunk-line railroads serving said City of Chicago with their own power and crews to the unloading platforms and chutes of plaintiff, where plaintiff unloads such live stock for said railroads from the railroad cars over plaintiff's said platforms and chutes and places such live stock in suitable pens in said stockyard owned by plaintiff. Outbound carload consignments of live stock shipped by rail are loaded by plaintiff for said trunk-line railroads from its pens in said stockyard and over its said chutes and platforms into railroad cars furnished and placed for loading by the railroads, and are thereafter transported from said platforms by the railroads with their own power and crews.

Plaintiff does not furnish any vehicle or any motive power for, nor in any way carry, the live stock which it unloads or loads for said railroads, as aforesaid, but drives such live stock from the railroad cars into suitable pens owned by plaintiff or drives such live stock from pens owned by plaintiff into the railroad cars. The carloads of live stock received at said stockyard by rail are shipped from points in the State of Illinois over lines of railroad wholly within said state, and from points in the United States without said state, and from points in the Dominion of Canada; and the carloads of live stock shipped from said stockyard by rail are shipped to points in the State of Illinois over lines of railroad wholly within said state, and to [fol. 7] points in the United States without said state, and to points in the Dominion of Canada.

4. Plaintiff's stockyard was constructed in 1865 and opened for business on Christmas day of that year. In addition to constructing a stockyard, plaintiff also con-

structed railroad tracks connecting with the trunk-line railroads entering the City of Chicago and providing access to its stockyard, over which it permitted the trunk-line railroads at all times to transport live stock with their own crews and engines. From 1865 to 1887 plaintiff also permitted the individual trunk-line railroads to handle dead freight over its tracks with their crews and engines. From 1887 to 1893 plaintiff's railroad facilities were operated for the handling of dead freight by a transfer association controlled by said trunk-line railroads. In 1893 plaintiff acquired the necessary locomotives, built a roundhouse, and began operation of its railroad facilities for the handling of dead freight.

In 1897 plaintiff leased its railroad properties and equipment for a term of fifty years to the Chicago & Indiana State Line Railway Company, retaining for itself the loading and unloading platforms, chutes, pens and other stockyard facilities. In 1898 said lessee company consolidated with another company, and the consolidated company became known as Chicago Junction Railway Company, a corporation duly organized and existing under the laws of the State of Illinois. The trunk-line railroads entering the City of Chicago were granted trackage rights for the handling of live stock over said railroad operated by said Chicago & Indiana State Line Railway Company and said Chicago Junction Railway Company.

Since shortly after plaintiff started business in 1865 it has performed, and still performs, as agent for the trunk-[fol. 8] line railroads, the said services of loading and unloading carload shipments of live stock consigned by rail from and to its said stockyard, and (except for a short period when a portion thereof was paid by shippers) its charges for said services have been paid to it, and are now paid to it, by the trunk-line railroads transporting such shipments to and from said stockyard.

5. Prior to 1913, plaintiff did not publish its charges for the services of loading and unloading such live stock with any regulatory body. On December 9, 1912, the Supreme Court of the United States in the case of United States v. Union Stock Yard, 226 U. S. 286, held that plaintiff, together with said Chicago Junction Railway Company (under the facts and circumstances then obtaining) was a common carrier subject to the Interstate Commerce Act. At and prior to the date of said decision plaintiff and said

Chicago Junction Railway Company were controlled by a New Jersey holding corporation; said Chicago Junction Railway Company was engaged in operating a railroad; and plaintiff received a share of the profits of said Chicago Junction Railway Company. In compliance with said decision of the Supreme Court of the United States, plaintiff filed with the Commission a tariff stating its charges for loading and unloading such carload shipments of live stock consigned by rail from and to its said stockyard, which tariff became effective on, to-wit, May 20, 1913; and since said date (except for a short period in 1919) plaintiff has kept such tariffs on file with the Commission. A copy of plaintiff's rate tariff I. C. C. No. 12 now on file with the Commission, which states the charges now made by plaintiff for the services of loading and unloading such carload [fol. 9] shipments of live stock, is attached hereto, marked "Exhibit A," and is hereby made a part hereof.

6. On, to-wit, December 1, 1913 plaintiff granted, demised and leased all the railroad properties and equipment then owned by it to said Chicago Junction Railway Company in perpetuity, at a rental of $600,000 per year by an indenture containing no defeasance clause or other provision giving plaintiff the right to recover possession of said properties or equipment. By supplemental indentures made or, to-wit, April 1, 1916, October 1, 1916 and January 1, 1918 plaintiff granted, demised and leased unto said Chicago Junction Railway Company, in perpetuity, certain additional lands in the City of Chicago.

7. On, to-wit, May 19, 1922, said Chicago Junction Railway Company leased all its railroad properties and equipment, including all the properties and equipment granted, demised and leased to it in perpetuity by the plaintiff, to The Chicago River and Indiana Railroad Company, a railroad corporation organized under and by virtue of the general railroad incorporation act of the State of Illinois in the year 1904, for a term of ninety-nine years; and at the same time all the capital stock of The Chicago River and Indiana Railroad Company was acquired by The New York Central Railroad Company. Upon the execution of said lease of May 19, 1922 said Chicago Junction Railway Company canceled its tariffs and ceased doing business as a common carrier. The making of said lease, the acquisition of said capital stock, the cancellation of said tariffs and the

said cessation of business were all pursuant to law and to approval and authority granted by the Interstate Commerce Commission in an order of said Commission made and entered on May 16, 1922 in a proceeding known as Chicago [fol. 10] Junction Case, which is reported in 71 I. C. C. Reports at pages 631 to 650, inclusive.

The properties of the plaintiff granted, demised and leased by it in perpetuity to said Chicago Junction Railway Company, as aforesaid, did not include plaintiff's platforms, chutes and pens used in the loading and unloading of carload shipments of live stock for the trunk-line railroads as hereinabove set forth, nor the private industry tracks used by plaintiff in connection with the receipt or shipment of feed, manure and supplies consigned by or to plaintiff by rail in connection with the maintenance and operation of its said stockyard. Since, to-wit, May 19, 1922 all railroad properties and equipment formerly owned, possessed or operated by plaintiff and all railroad properties and equipment previously owned, leased, possessed or operated by said Chicago Junction Railway Company have been, and now are, operated by The Chicago River and Indiana Railroad Company as a common carrier by rail for hire as a part of the system of railroads commonly known as the New York Central System. Since, to-wit, May 19, 1922 neither plaintiff nor said Chicago Junction Railway Company has operated any railroad or transported any persons or property; and neither plaintiff nor said Railway Company now operates any railroad or transports any persons or property.

8. Plaintiff is not now a common carrier by railroad or otherwise. Plaintiff does not possess, operate or control in any way, either directly or indirectly, any railroad or part thereof; it does not own, possess, operate or exercise any control over any cars, locomotives or other railroad rolling stock; it does not transport persons or property from place to place by rail or otherwise; it does not hold it- [fol. 11] self out or undertake, for hire or otherwise, to transport persons or property from place to place by rail or otherwise; it does not own, possess or operate the facilities necessary for so transporting persons or property; it is not, either directly or indirectly, associated with or controlled by any common carrier by railroad; it has no interest, direct or indirect, in any common carrier by railroad; it does not,

either directly or indirectly, control any common carrier by railroad; it is not affiliated with nor controlled, directly or indirectly, by any person, firm or corporation who or which, either directly or indirectly, controls or operates any common carrier by railroad; it does not share in the profits of any common carrier by railroad; it does not perform, nor hold itself out to perform, any services or acts as a common carrier by railroad or otherwise; it is not a common carrier by railroad or otherwise; and it is not a common carrier subject to the provisions of the Interstate Commerce Act or the jurisdiction of the Commission.

9. On, to-wit, December 15, 1936 plaintiff filed with the Commission supplement No. 5 to its rate tariff I. C. C. No. 12, to become effective on January 15, 1937, a copy of said supplement being attached hereto, marked "Exhibit B," and hereby made a part hereof. In and by said tariff supplement plaintiff undertook to cancel its only rate tariff I. C. C. No. 12 (Exhibit A hereto) then and now on file with the Commission, and in which are stated its present charges for loading and unloading carload shipments of live stock as agent for the railroads at its said stockyard in said City of Chicago. On, to-wit, December 15, 1936 plaintiff also filed with the Commission Supplement No. 5 to its tariff index I. C. C. No. 13, to become effective on January 15, 1937, whereby it undertook to cancel the tariff index that it had [fol. 12] on file with the Commission a copy of said supplement being attached hereto, marked "Exhibit C," and hereby made a part hereof.

On, to-wit, January 4, 1937, Atchison, Topeka & Santa Fe Railway Company, Charles P. Megan, Trustee of Chicago and North Western Railway Company, Chicago, Burlington and Quincy Railroad Company, H. A. Scandrett, Walter J. Cummings, and George I. Haight; Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, Illinois Central Railroad Company and Minneapolis, St. Paul & Saulte Ste. Marie Railway Company filed with the Commission their petition complaining of and protesting against the proposed cancellation by plaintiff of its said rate tariff I. C. C. No. 12 and requesting that supplement No. 5 to said tariff be suspended and, after hearing, be

canceled. Excerpts from said petition which show the parties thereto and the relief requested are attached hereto as Exhibit D and made a part hereof.

By an order entered on January 11, 1937 the Commission suspended the operation of said supplement No. 5 to said rate tariff and said supplement No. 5 to said tariff index (which said supplements are hereinafter called "cancellation tariffs") until August 15, 1937, and ordered that the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of said cancellation tariffs. A copy of said order of January 11, 1937 is attached hereto, marked "Exhibit E," and is hereby made a part hereof.

Pursuant to said order of January 11, 1937, the Commission entered upon an investigation concerning the lawful- [fol. 13] ness of said cancellation tariffs, which said investigation is designated on the docket of the Commission as "Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago." Afterwards, upon due notice, hearings were held in said proceeding by the Commission in the City of Washington, in the District of Columbia, and in said City of Chicago, Illinois, at which hearings plaintiff appeared and introduced certain evidence, and sought and attempted to introduce other evidence. In order that the Commission might have ample time to hear and determine said proceeding, plaintiff postponed from time to time the effective date of its said cancellation tariffs, the present effective date thereof being January 1, 1939.

10. The hearing held in said City of Chicago was presided over by an examiner of the Commission designated by the Commission to conduct said hearing. At said hearing plaintiff sought and attempted to introduce evidence to show, among other things, (a) that there are approximately one hundred thirty-five public stockyards in the United States, in addition to plaintiff's stockyard, which are subject to the jurisdiction of the Secretary of Agriculture, and which perform the services of loading and unloading interstate and intrastate shipments of live stock for railroads and are paid therefor by the railroads which they serve; (b) that the Commission itself, and said public stockyard companies and the railroads serving public stockyards throughout the United States (including the carriers which protested against plaintiff's said cancellation tariffs) have for many

years, by practical construction, construed the Interstate Commerce Act as not applicable to stockyard companies, even where the circumstances and conditions are similar to [fol. 14] those obtaining with respect to plaintiff and the operation of its stockyard in said City of Chicago; (c) that all said public stockyard companies hold, and have throughout their existence held, themselves out to perform the services of loading and unloading live stock for the railroads which they serve; (d) that the facilities and services of said public stockyard companies are similar to those of plaintiff at its stockyard in said City of Chicago; (e) that close intercorporate relationships and affiliations exist between many of said public stockyard companies and the railroads serving them; (f) that certain of said stockyard companies control or are controlled by the railroad or railroads serving them; (g) that the corporate powers of many of said stockyard companies are substantially the same as the corporate powers of plaintiff; (h) that the Commission over the years had knowledge of the circumstances and conditions obtaining at many public stockyards and was informed that such circumstances and conditions are similar to those at plaintiff's stockyard; (i) that the Commission has never required any of said public stockyard companies, except plaintiff, to file tariffs with the Commission covering the services of loading and unloading live stock performed for railroads, or construed the Interstate Commerce Act as in any way applicable to said companies; (j) that many of said public stockyard companies publish their loading and unloading charges in schedules filed with the Secretary of Agriculture; (k) that at public stockyards which publish their charges for loading and unloading live stock for railroads in schedules on file with the Secretary of Agriculture the railroads (including the carriers which protested against plaintiff's said cancellation tariffs) pay such tariff charges for loading and unloading live stock without question; (l) that many [fol. 15] public stockyard companies perform the services of loading and unloading live stock for the railroads under contracts with the railroads; (m) that the carriers which protested against plaintiff's said cancellation tariffs have from time to time voluntarily entered into contracts for loading and unloading services with public stockyards where the circumstances and conditions are similar to those at plaintiff's stockyard; (n) that even though railroads throughout the United States engage public stockyard companies to

perform the services of loading and unloading live stock, there have been no substantial controversies over the charges therefor except in two or three instances; (o) that at public stockyards where so-called barter-and-trade methods are employed in fixing the charges for the services of loading and unloading live stock, the railroads have been able to agree with the stockyard companies on the amount of the charges without hardship to the railroads and without increasing their line-haul freight rates to shippers; (p) that the carriers which protested against plaintiff's said cancellation tariffs do not treat other public stockyard companies as common carriers; (q) that the form and substance of railroad tariffs stating rates, rules and regulations on live stock to and from plaintiff's stockyard in said City of Chicago are substantially the same as the form and substance of railroad tariffs stating rates, rules and regulations on live stock to and from other public stockyards; (r) that the existence of the so-called "bottle neck" condition at plaintiff's stockyard with respect to the stream of live stock moving in interstate commerce into and through the city in which it is located is not a condition peculiar to plaintiff's stockyard in said city, but also obtains at nearly every other public stockyard in the United States; (s) that one stockyard company in nearly every community throughout [fol. 16] the United States where a public stockyard or stockyards is located handles the major part of the live stock; (t) that nearly all public stockyard companies in the United States have a practical monopoly of the stockyard business in their respective communities; (u) that all public stockyard companies in the United States have always insisted upon performing the loading and unloading services for the railroads for the reason that there would be endless confusion, slowing up of operations, and inefficiency if the railroads were permitted to perform such services; and (v) that in situations analogous to that obtaining at plaintiff's stockyard with respect to loading and unloading live stock for railroads, such as the handling of cotton for railroads at transit points, the handling of freight for railroads by lighterage companies and dock companies at shipside, and the pickup and delivery services performed by truckers for railroads, the Commission has never required the person or persons performing such services for the railroads to file tariffs with the Commission.

Plaintiff sought and attempted to introduce such evidence to show the practical construction of the Interstate Commerce Act throughout the years by the Commission, by the railroads and by stockyard companies. Plaintiff also sought and attempted to introduce such evidence in explanation and in rebuttal of evidence introduced in said proceeding by one of the members of the Commission at the hearing held in said City of Washington and in explanation and rebuttal of evidence introduced by carriers which appeared at said hearing and at the hearing in said City of Chicago in opposition to plaintiff's attempt to cancel its said rate tariff on file with the Commission.

The examiner presiding at said hearing in said City of Chicago refused to receive such evidence, or any evidence [fol. 17] pertaining to public stockyards other than plaintiff's stockyard, notwithstanding the fact the only objection to the admission of such evidence was on the ground that it was irrelevant and immaterial; refused to permit plaintiff to ask questions of its witness designed to bring out such evidence, or even to show the qualifications of said witness to testify with respect thereto; refused to permit plaintiff to have exhibits containing such evidence marked for identification by the reporter of the Commission; and refused to allow plaintiff to make specific offers of proof of such evidence. The conduct of said hearing by said examiner in the respects just mentioned was arbitrary, unreasonable and contrary to law.

Thereafter, on or about September 8, 1937, plaintiff filed with the Commission a petition for further hearing before final submission. In said petition plaintiff briefly stated the nature and purpose of the evidence which it wished to adduce (to-wit, the evidence hereinabove described in this section 10) and which the said examiner had refused to receive, and set forth the conduct and action of said examiner mentioned in the preceding paragraph hereof. Plaintiff, in said petition, prayed that said proceeding before the Commission be set for further hearing; that the examiner assigned to hear the proceeding be instructed to receive the evidence rejected at said hearing in said City of Chicago or such part thereof as the Commission might deem material and relevant; that in any event plaintiff be given an opportunity at a further hearing before final submission to make offers of proof of specific facts in respect of any such evi-

dence not received or deemed immaterial or irrelevant by the Commission, including the opportunity to have exhibits marked for identification and to offer them in evidence; and that the Commission grant such further relief in the [fol. 18] premises as might be meet. Plaintiff was unable in said petition to set forth specifically the evidence which it wished to offer because one of the rules of practice of the Commission known as Rule XV, which was in full force and effect at the time said petition was filed and at all times when said proceeding was pending before the Commission, provided that "If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative." The Commission by an order entered on November 8, 1937 denied said petition for further hearing before final submission.

11. On or about April 29, 1938 the said examiner of the Commission issued a proposed report in said proceeding, and exceptions thereto were filed by plaintiff.

On July 11, 1938, the Commission made and entered its report and order in said proceeding, with one member of the Commission concurring in the result in a separate opinion and three members thereof dissenting in separate opinions. On or about August 12, 1938, the Commission issued its corrected report as of July 11, 1938, which corrected report is hereinafter referred to as "report" or "report of July 11, 1938." A copy of said report, concurring opinion, dissenting opinions and order is attached hereto, marked "Exhibit F," and is hereby made a part hereof. A copy of the dissenting opinion of Commissioner Meyer in the proceeding known as Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330, referred to by him in his dissent to said report of July 11, 1938, is attached hereto marked Exhibit G and is hereby made a part hereof.

[fol. 19] 12. In and by said report of July 11, 1938, the Commission found that the plaintiff in the performance of the services of loading and unloading live stock at Union Stock Yards, Chicago, is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with the Commission covering plaintiff's loading and unloading charges, and further found

that the suspended schedules, to-wit, the said cancellation tariffs, were not justified; and in and by said order of July 11, 1938 the Commission ordered plaintiff to cancel said cancellation tariffs on or before August 17, 1938 upon notice to the Commission and to the general public by not less than one day's filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and further ordered that the said proceeding before the Commission be discontinued. Thereafter, by an order entered on July 19, 1938, the Commission postponed the effective date of said order of July 11, 1938 to October 1, 1938, a copy of which said order of July 19, 1938 is attached hereto, marked "Exhibit H," and is hereby made a part hereof. Said order of July 11, 1938, as modified by said order of July 19, 1938, will hereinafter be referred to as "final order."

13. Plaintiff, as hereinabove alleged, is not a common carrier by railroad or otherwise, and is not a common carrier subject to the provisions of the Interstate Commerce Act or the jurisdiction of the Commission. The effect of said report and final order of the Commission, if said final order is not enjoined, set aside, annulled and suspended, will be to require plaintiff to maintain on file with the Commission tariffs stating its charges for the services of loading and unloading carload shipments of live stock consigned by rail to and from its stockyard in said City of Chicago and to do other acts and things required by the [fol. 20] Interstate Commerce Act and the rules, regulations and orders of the Commission, and by reason thereof plaintiff will be required to submit to the jurisdiction of the Commission with respect to such activities or be subject to prosecution for failure to comply with said act and such rules, regulations and orders of the Commission.

14. Said final order of the Commission herein complained of, and set forth in full in Exhibit F attached hereto, is unlawful, invalid, null and void because (a) under the evidence of record in the said proceeding before the Commission plaintiff is not a common carrier by railroad or otherwise; (b) plaintiff is not a common carrier subject to the provisions of the Interstate Commerce Act or the jurisdiction of the Commission; (c) there is no law which requires plaintiff to maintain on file with the Commission any tariff stating the charges made by it for the

services of loading or unloading carload shipments of live stock at its stockyard in said City of Chicago, or for any other services rendered by it, or which authorizes the Commission to require that any such tariff be maintained on file with the Commission; (d) the evidence introduced in the record in the said proceeding before the Commission is insufficient to sustain or support said final order; (e) said final order is not based upon the evidence of record in said proceeding, and is unreasonable, arbitrary, contrary to the evidence in said proceeding, beyond the lawful authority of the Commission, without warrant in law, erroneous in law, and contrary to law; (f) the findings made by the Commission are not based upon or supported by evidence of record; (g) the findings made by the Commission are insufficient to sustain or support said final order; (h) the Commission did not make findings sufficient to sustain or support said final order; (i) said final order [fol. 21] will deprive plaintiff of its liberty to control, manage, operate and deal with its property and to conduct its business as it has the right under the law; (j) said final order will deprive plaintiff of its liberty and of its property without due process of law, and will take its property for public use without just compensation, all in violation of and contrary to the provisions of the Fifth Amendment to the Constitution of the United States; (k) the Commission in said proceeding failed and refused to receive competent, relevant, and material evidence proffered by plaintiff; (l) the Commission in said proceeding failed and refused to permit the plaintiff to qualify its witness, to have exhibits marked for identification, or to make specific offers of proof, with respect to competent, relevant and material evidence; (m) said final order was not made and entered after the full hearing required by paragraph 7 of Section 15 of the Interstate Commerce Act (49 U. S. Code sec. 15, par. 7); (n) said final order was made and entered without according to plaintiff, although duly demanded by the plaintiff, a full hearing as required by paragraph 7 of Section 15 of the Interstate Commerce Act; and (o) said final order was made and entered without according to plaintiff, although duly demanded by the plaintiff, the full and fair hearing to which it was entitled under and by reason of the Fifth Amendment to the Constitution of the United States.

15. Said final order, as hereinabove alleged, requires plaintiff to cancel its said cancellation tariffs on or before October 1, 1938. Paragraph 8 of Section 16 of the Interstate Commerce Act (49 U. S. Code sec. 16, par. 8) imposes a penalty of five thousand dollars upon any carrier, and upon any officer, representative or agent of a carrier, who knowingly fails or neglects to obey any order [fol. 22] made under the provisions of Section 15 of said act. Said final order was made under the provisions of Section 15 of said act, and if, as the Commission has found in its said report of July 11, 1938 (which report is made a part of said final order by the provisions of said order of July 11, 1938), the plaintiff is a common carrier subject to the provisions of the Interstate Commerce Act, the failure of the plaintiff or of any of its officers, representatives or agents to comply with said final order will subject them, and each of them, to a penalty of five thousand dollars for each offense and to a like penalty for each and every day of the continuance of such failure to comply with said final order. Said final order, unless it is enjoined, set aside, annulled and suspended by this Court, may deprive, and threatens to deprive, plaintiff of large sums of money to which it otherwise might become entitled; and will require plaintiff to expend large sums of money in order to comply with said final order and with the provisions of the Interstate Commerce Act, all of which sums plaintiff will be unable to recover; and will cause irreparable damage to plaintiff. If said final order is not enjoined, set aside, annulled and suspended by this Court, plaintiff will either have to incur the risk of being deprived of its right to judicial review of said final order by complying therewith or plaintiff and its officers, representatives and agents will be required to incur the risk of the aforesaid penalties.

16. Plaintiff has no adequate remedy at law, its only remedy being in this court of equity.

Wherefore, plaintiff prays:

(1) That this bill of complaint be received and filed; that writs of subpoena be issued by the Clerk of this Court, as provided by law, commanding the defendants, and each [fol. 23] of them, to appear and defend this action and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived.

(2) That a preliminary or interlocutory injunction be entered herein restraining, enjoining and suspending, until the further order of this Court, the enforcement, operation and execution of said final order of the Commission.

(3) That, after final hearing, this Court adjudge, order and decree that said final order of the Commission has at all times been and is beyond the lawful authority of the Commission and has at all times been and is unlawful, invalid, null and void, and that said order be perpetually enjoined, set aside, annulled and suspended, and the enforcement, operation and execution thereof be perpetually enjoined.

(4) That plaintiff may have such other and further relief in the premises as in equity and in justice it is entitled to receive.

Ralph M. Shaw, John D. Black, Guy A. Gladson, Bryce L. Hamilton, Solicitors for Plaintiff.

[fol. 24] *Duly sworn to by O. T. Henkle. Jurat omitted in printing.*

[fol. 25] EXHIBIT "A" TO COMPLAINT

Increases

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff.

I. C. C. No. 12, Cancels I. C. C. No. 8

U. S. Y. & T. Co. Tariff No. 9, Cancels Tariff No. 5

The Union Stock Yard and Transit Company of Chicago

TARIFF

Naming Loading and Unloading Charges

on

LIVE STOCK

at Union Stock Yards, Chicago

The charge made by this Company for the service (as a carrier's agent) of loading and unloading Live Stock at the Union Stock Yards of Chicago, Ill., is as follows:

For Loading, one dollar twenty-five cents ($1.25) per single deck car;

One dollar fifty cents ($1.50) per double deck car.
For Unloading, one dollar twenty-five cents ($1.25) per single deck car;
One dollar fifty cents ($1.50) per double deck car.

Issued Oct. 20, 1934. Effective Dec. 1, 1934

Issued by O. T. Henkle, General Manager, U. S. Y. & T. Co., Chicago, Ill.

[fol. 26] EXHIBIT "B" TO COMPLAINT

Supplement No. 5 to I. C. C. No. 12, Cancels I. C. C. No. 12 and Supplement No. 4

Supplement No. 5 to the U. S. Y. and T. Co. of Chicago Tariff No. 9

The Union Stock Yard and Transit Company of Chicago

TARIFF

Naming Loading and Unloading Charges

on

LIVE STOCK

at Union Stock Yards, Chicago

The U. S. Y. and T. Co. of Chicago Tariff No. 9, I. C. C. No. 12 is hereby canceled. No tariffs of this company will hereafter be filed with the Interstate Commerce Commission.

Issued December 15, 1936. Effective January 15, 1937

Issued by O. T. Henkle, Vice-President and General Manager, The U. S. Y. and T. Co. of Chicago, Chicago, Ill.

[fol. 27] EXHIBIT "C" TO COMPLAINT

Supplement No. 5 to I. C. C. No. 13, Cancels I. C. C. No. 13 and Supplement No. 4

The Union Stock Yard and Transit Company of Chicago

SUPPLEMENT NO. 5 TO TARIFF INDEX

The U. S. Y. and T. Co. of Chicago No. 10

The U. S. Y. and T. Co. of Chicago, Tariff Index I. C. C. No. 13 (The U. S. Y. and T. Co. of Chicago No. 10) is hereby

cancelled. No tariffs of this company will hereafter be filed with the Interstate Commerce Commission.

Issued January 15, 1937

Issued by O. T. Henkle, Vice-President and General Manager, The U. S. Y. and T. Co. of Chicago, Chicago, Ill.

[fol. 28] EXHIBIT "D" TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Protest and Request for Suspension of the Operation of Supplement No. 5 to U. S. Y. & T. Co. of Chicago, Tariff No. 9, I. C. C. No. 12

Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company

Come now the railroad companies named above as protestants, and complain and protest against the tariff described in the title hereto, and against the same becoming effective. Protestants petition the Commission to enter upon a hearing concerning the lawfulness of said tariff, and, pending such hearing and the decision of the Commission, to suspend the operation of said publication.

As the basis for this protest and in support thereof protestants respectfully show:

Protestants are Class I carriers by railroad engaged in interstate commerce and subject to the Interstate Commerce Act. The Union Stock Yard & Transit Company (hereinafter called the Yards Company) is, with respect to part of [fol. 29] its business, a common carrier of freight for hire, engaged in interstate commerce and subject to the Interstate Commerce Act. The Yards Company is also a "Stockyard

Owner" as that term is defined in the Packers and Stockyards Act (U. S. C. A. Title 7, Sec. 201), and is engaged as such in conducting and operating a public stockyard in the City of Chicago, Illinois. In the conduct and operation of its business as a "Stockyard Owner" the Yards Company is not of course a common carrier, but is subject to the jurisdiction and regulation of the Secretary of Agriculture.

Protestant carriers are engaged in the transportation of live stock to and from Chicago, Illinois, and in connection with the Yards Company, make deliveries of live stock at the yards of the Union Stock Yards and receive live stock for transportation from the said yards when so instructed by the shipper or consignee.

The common carrier services of the Yards Company in connection with the said live stock traffic at Chicago are performed under and pursuant to its tariff No. 9, I. C. C. No. 12.

By the tariff of which suspension is here sought (hereinafter called "the cancellation tariff"), the Yards Company seeks to cancel its said tariff carrying its so-called loading and unloading charges. The cancellation tariff states on its face that "No tariffs of this Company will hereafter be filed with the Interstate Commerce Commission."

The filing of this cancellation tariff constitutes the fifth attempt of the Yards Company, and the third within a year, to avoid the regulation and supervision of its charges by this Commission.

* * * * * * *

[Certain text here omitted.]

[fol. 30] In performing the service of loading and unloading live stock at Chicago the Yards Company is acting as a common carrier subject to the Interstate Commerce Act, and the Supreme Court of the United States, and this Commission have so held. On the basis of these decisions, the last of which was rendered within a year (213 I. C. C. 330), we respectfully ask that this tariff be suspended, and after the hearing thereon, that it be cancelled.

Respectfully submitted,

Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Mil-

waukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Protestants.

By Kenneth F. Burgess, Bouton McDougal, Douglas F. Smith, Attorneys for Protestants.

Sidley, McPherson, Austin & Burgess, Of Counsel.

(Appendix omitted)

[fol. 31] EXHIBIT "E" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of January, A. D. 1937.

Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago

It appearing, That there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 15th day of January, 1937, designated as follows:

The Union Stock Yard and Transit Company of Chicago:

Supplement No. 5 to I. C. C. No. 12;
Supplement No. 5 to I. C. C. No. 13;

It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs.

It further appearing, That said schedules make certain changes affecting rates for the interstate transportation of live stock, carloads, and the rights and interests of the public appearing to be injuriously affected thereby, and it being [fol. 32] the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon;

It is further ordered, That the operation of all schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 15th day of August, 1937, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, That the rates and charges and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

It is further ordered, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that a copy hereof be forthwith served upon The Union Stock Yard and Transit Company of Chicago, and that said carrier party to said schedules be, and it is hereby, made respondent to this proceeding.

And it is further ordered, That this proceeding be, and the same is hereby assigned for hearing February 11, 1937, 10 o'clock A. M. Standard time, at the office of the Interstate Commerce Commission, Washington, D. C., before Commissioner Splawn and Examiner Carter.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 33] EXHIBIT "F" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Corrected Report

Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago

Submitted June 23, 1938. Decided July 11, 1938

Union Stock Yard and Transit Company found to be a common carrier subject to the provisions of the Interstate Commerce Act. Proposed cancelation of its tariffs naming loading and unloading charges on livestock at Union Stock Yards, Chicago, Ill., found not justified. Suspended schedules ordered canceled and proceeding discontinued

Ralph M. Shaw, Guy A. Gladson, R. C. Fulbright, and Bryce L. Hamilton for respondent.

Douglas F. Smith, Kenneth F. Burgess, C. Daggett Harvey, Bouton McDougal, Lee J. Quasey, Charles E. Blaine, and Charles A. Stewart for protestants.

Luther M. Walter for St. Louis National Stock Yards Company.

A. Z. Baker for American Stock Yards Association.

John A. Zelinski for United States Department of Agriculture, Bureau of Animal Industry, Packers and Stock Yards Division.

[fol. 34] Report of the Commission

SPLAWN, Chairman:

Exceptions to the report proposed by the Examiner were filed by respondent, protestants replied thereto, and the parties were heard in oral argument.

The issue in this proceeding is whether respondent, the Union Stock Yard and Transit Company of Chicago, hereinafter called the Yard Company, is a common carrier by railroad subject to the provisions of the Interstate Commerce Act in respect of the services it performs at the Union Stock Yards in Chicago, Ill., in connection with the unloading and loading of carload shipments of livestock

transported by railroad in interstate commerce to and from the Union Stock Yards. The status of the Yard Company as a common carrier subject to the act has been determined by the Supreme Court and has also been determined by the Commission on several occasions. United States v. Union Stock Yard, 226 U. S. 286; Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330; Livestock Loading and Unloading Charges, 52 I. C. C. 209, 58 I. C. C. 164. See also Livestock Loading and Unloading Charges, 61 I. C. C. 223; Loading and Unloading Livestock at Chicago, 83 I. C. C. 248; Adams v. Mills, 286 U. S. 397; Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. 193; Livestock To or From Union Stock Yards, Chicago, 222 I. C. C. 765.

In Livestock Loaded and Unloaded at Chicago, supra, Investigation and Suspension docket No. 4109, the Yard Company proposed to cancel all its tariffs on file with us, effective June 19, 1935. These tariffs contained the charges, assessed and collected by the Yard Company for the loading [fol. 35] and unloading of livestock at the Union Stock Yards. The cancellation supplements bore the notation "No tariffs of this company will hereafter be filed with the Interstate Commerce Commission." The operation of those supplements was suspended and a hearing was held. In our report of December 11, 1935, we found the Yard Company to be a common carrier subject to the provisions of the act in the performance of the loading and unloading services, and that, as such, it was required to file with us tariffs covering its charges for loading and unloading livestock at its public stock yards in Chicago. An order requiring the Yard Company to cancel the suspended schedules was entered.

Subsequently on January 14, 1936, the Yard Company filed a petition for rehearing, reconsideration, and reargument. The chief basis for the request for further hearing was an offer to prove that we had not required the filing of loading or unloading tariffs by stock yard companies located at other points where the circumstances and conditions in connection with the loading and unloading services were alleged to be similar to those obtaining at petitioner's yard. In this connection the Yard Company alleged that the practical construction of the act by us had been that it was not applicable to services or charges for loading or unloading livestock at public stock yards other than Chicago. Descriptions of the alleged conditions existing at a number of other

stock yards were included in the petition. After consideration we denied the petition.

By schedules filed to become effective January 15, 1937, the Yard Company again proposed to cancel its tariffs on file with us. The schedules in which this proposal was made were identical, except as to the effective date, with those filed [fol. 36] in June 1935, which were suspended and found not justified in Investigation and Suspension Docket No. 4109. They contained the notation "No tariffs of this company will hereafter be filed with the Interstate Commerce Commission." The above schedules were protected by certain railroad companies[1] engaged in the transportation of livestock to and from Chicago, and were suspended until August 15, 1937. Subsequently, their effective date was voluntarily postponed by respondent until January 1, 1939. Hearings were held in Washington, D. C., and Chicago. Protestants and representatives of National Livestock Marketing Association, American National Livestock Association, National Wool Growers Association, and Texas-Southwestern Cattle Raisers Association appeared in opposition to the suspended schedules. The Yard Company requested that a proposed report be issued, and at the Chicago hearing its representatives agreed to postpone the oper-tion of the suspended schedules pending consideration and determination of the issue by us.

The issue raised by the suspended schedules is identical with the issue considered and determined in December 1935 in Investigation and Suspension Docket No. 4109. In the report in that proceeding, the facts with respect to the loading and unloading services, the status of the Yard Company, including the intercorporate relationships between it, The Chicago Junction Railway and the New Jersey holding company, which owns them, and the lease in 1922 between the Yard Company, the Chicago Junction Railway, the Chicago River and Indiana Railroad Company and The New York

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[1]Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; Illinois Central Railroad Company; and Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

[fol. 37] Central Railroad Company, were fully stated. It is conceded by all parties that the services which the Yard Company performs in connection with the loading and unloading of livestock at Union Stock Yards in Chicago, the manner in which such services are performed, the intercorporate relationships between the Yard Company, the Chicago Junction Railway, and the New Jersey holding company, and the provisions of the 1922 lease are the same as they were when that proceeding was considered and decided.

The evidence introduced by the Yard Company in this proceeding is in all material respects essentially the same as that introduced in Investigation and Suspension Docket No. 4109, and consisted of detailed evidence relating to the history of the Yard Company and its operations, and descriptions of the services of loading and unloading livestock. Copies of the charter of the Yard Company and of agreements between it and the Chicago Junction Railway and the Chicago and Indiana State Line Railway Company, and of the 1922 lease were made a part of the record.

In addition to the evidence described above, respondent attempted to have made a part of the record evidence relating to the circumstances and conditions at stock yards located at points other than Chicago. In this connection it sought to introduce evidence purporting to show the facts concerning the situations at all the major stock yards in the United States, including their construction, their corporate powers and relationships, their railroad facilities, their operations and operating arrangements, their locations and economic status, the amount and character of their business and their contracts with railroads companies. They also attempted to introduce evidence purporting to show that [fol. 38] the treatment accorded other stock yard companies by us has been different than that accorded respondent; that all stock yard companies insist upon the performance by its own employees of the loading and unloading of livestock transported by rail; and that all stock yard companies hold, and have throughout their existence held themselves out to perform the loading and unloading services for the railroads.

The evidence described was objected to by protestants as irrelevant and immaterial. The objections were sustained by the presiding examiner who did not allow the evidence to be made a part of the record. The Yard Company then

offered to prove in the exact form in which the evidence was originally offered the facts held by the examiner to be inadmissible. The offers of proof in this form were objected to. The objections were sustained by the examiner but the Yard Company was afforded the opportunity of describing in the record the character of the evidence sought to be introduced and what it purported to show. The Yard Company availed itself of this opportunity and the general character of the evidence held inadmissible by the examiner is described in the record.

Subsequent to the close of the hearing the Yard Company filed a petition for further hearing in which it sought to have us review the rulings of the examiner. In this petition it prayed that the proceeding be set for further hearing and that the examiner assigned to conduct such hearing be instructed to receive the evidence held inadmissible at the preceding hearings or such part thereof as we might deem to be material or relevant; or that in any event it be given an opportunity at a further hearing before final submission to make offers of specific facts in respect of the [fol. 39] evidence not received, or deemed immaterial or irrelevant. We considered this petition and denied it on November 8, 1937, on the ground that the question whether the Yard Company is subject to the act must be determined upon consideration of the facts and circumstances pertaining to that company; and that the question of the status of other stock yards companies throughout the country was not material to the issue in this proceeding.

The facts with respect to the services performed by the Yard Company in connection with the loading and unloading of livestock, the circumstances under which such services are performed and other pertinent facts are stated in our report in Livestock Loaded and Unloaded at Chicago, supra. Such facts and circumstances are now the same in every respect as those set forth in the report in that proceeding, shown in the appendix hereto and made a part hereof; and we adopt the statements and findings of fact contained in that report, its reasoning and conclusions.

It is appropriate, however, to refer to one fact of record, both in this proceeding and in Investigation and Suspension Docket No. 4109, which was not mentioned in the report in the latter proceeding. In United States v. Union Stock Yard, supra, decided in 1912, the Supreme Court found the Yard Company to be a common carrier subject to the

act. In Investigation and Suspension Docket No. 4109, the Yard Company contended that the court's finding in the above case was based upon the existence of an intercorporate relationship between it and the Chicago Junction Railway (then operator of the railroad) effectuated by stock control of both companies held by the New Jersey holding [fol. 40] company; that by reason of the sub-lease and lease in 1922 (described in the report in I. & S. No. 4109) of the railroad properties to the Chicago River Railway Company (which is now operating them), the Yard Company had ceased to be affiliated with a company operating a railroad and, in effect, that with the cessation of such affiliation, its services of loading and unloading livestock had ceased to be common carriage subject to the act. The Yard Company contended that with the execution of the lease in 1922 it divested itself of the status of a common carrier by railroad. Under the terms of that lease the Yard Company covenants that at any time it may be called upon by its lessees to do so it will exercise its charter powers as a railroad to condemn any lands needed in connection with the operation of the leased property and that it will keep alive its charter powers as a railroad during the term of the lease in order to preserve its powers of eminent domain.

As stated, one of the contentions of the Yard Company is that in the lease of 1922, it divested itself of its common carrier status. We do not believe that such divestiture can be accomplished by contract. It is of interest to note that in the same instrument the Yard Company covenanted with its lessee to preserve its status as a railroad in order that it might exercise the right of eminent domain, a right it possessed under the provisions of its charter only because it was a railroad. It thus appears that the objectives of the Yard Company in the 1922 lease were on the one hand a desire to be relieved of its obligations as a railroad and on the other hand a desire to retain the valuable right of eminent domain which it could exercise only because it was a railroad. Looking to the substance of the 1922 lease, we are of the opinion and find that it did not accom- [fol. 41] plish any change in the status of the Yard Company under the Interstate Commerce Act.

Upon consideration of the evidence in this proceeding we find that the Yard Company in the performance of the services of loading and unloading livestock at Union Stock Yards, Chicago, is a common carrier subject to the provi-

sions of the Interstate Commerce Act and as such is required to file tariffs with us covering its loading and unloading charges.

We further find that the suspended schedules are not justified. An order will be entered requiring cancellation of the suspended schedules and discontinuing this proceeding.

Appendix

The Union Stock Yard & Transit Company, hereinafter called respondent, filed schedules, effective June 19, 1935, in which it proposed to cancel its tariffs naming charges for loading and unloading livestock at the Union Stock Yards in Chicago, Ill. The cancelation supplements bear the notation, "No tariffs of this company will hereafter be filed with the Interstate Commerce Commission." If the cancelation of the tariffs is permitted no tariffs containing charges for loading and unloading livestock at the Union Stock Yards will be on file with us. The operation of the above schedules was suspended until January 19, 1936, on our own motion, and a hearing was held. The cancelation of respondent's tariffs is opposed by practically all railroad carriers[1] transporting livestock to Chicago.

In United States v. Union Stock Yard, 226 U. S. 286 (December 9, 1912), hereinafter referred to as the Union Stock Yards case, respondent was held to be a common carrier subject to the provisions of the Interstate Commerce [fol. 42] Act. Pursuant to that decision respondent filed with us its tariffs naming charges for loading and unloading livestock (Adams v. Mills, 286 U. S. 397, 412) and, although the amounts named have been changed, has since had continuously on file with us tariffs of charges for such transportation service. Atchison T. & S. F. Ry. Co. v. United States, 295 U. S. 193, 201. (Hygrade case.)

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[1] The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago and Eastern Illinois Railway Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; and Wabash Railway Company.

Respondent contends that it is not now and has not been since 1922 a common carrier subject to the act, and that, therefore, it is not required to file tariffs with us. The issue is whether or not respondent is a common carrier subject to the provisions of the act.

The Union Stock Yard & Transit Company was organized in 1865 under a special charter from the State of Illinois, which granted to it the power to build, own and operate a railroad and a stockyard, and the power of eminent domain. The charter provided, among other things, that the company shall construct a railway, with one or more tracks which may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside the City of Chicago, the same with the tracks of all railroads which terminate in Chicago * * * and to make connections with such suitable sidetracks, switches and connections as to enable all the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks * * * for the purposes aforesaid * * *. Under this authority the company acquired real estate, constructed a public stockyard and approximately 300 miles of railroad tracks, consisting of main lines connecting with trunk lines entering Chicago and switches to various industries located adjacent to its tracks.

Prior to 1887, respondent operated both its stockyard and railroad facilities in its own name. From 1887 to 1893, the railroad facilities, except the loading and unloading chutes and pens were operated by a transfer association controlled by the carriers. In 1893 respondent resumed operation of all its facilities. In 1897 it leased its railroad tracks, property and equipment for a term of 50 years to the Chicago & Indiana State Line Company, retaining for itself the loading and unloading platforms and facilities used in connection with its stock yard business.

On January 1, 1898, the lessee company above mentioned consolidated with the Chicago, Hammond & Western Railroad Company, the consolidated company becoming known as the Chicago Junction Railway Company, hereinafter called the Junction. Under the terms of the lease above referred to, respondent received first from the Chicago & Indiana State Line Company, and later from its successor,

the Junction, two-thirds of the profits derived from the operation of the leased properties. In 1907, the Junction sold a belt line which it operated around the City of Chicago; [fol. 43] thereafter retaining and operating only those railroad properties owned by respondent and which had been leased from it under the 50-year lease of 1897. About that time the Chicago Junction Railways & Union Stock Yards Company, a holding company organized under the laws of New Jersey, became owner of 90 percent of respondent's capital stock and practically all the capital stock of the Junction.

Pursuant to respondent's charter and under an agreement with the Junction, the trunk lines entering Chicago were granted trackage rights over the railroad. Operating under the trackage rights, the trunk lines delivered livestock directly to the platforms of respondent. There was a special service as to horses and mules, shipments thereof being transported by the trunk lines to the platforms of respondent and being there picked up by the Junction and hauled to the unloading chutes for horses and mules. The Junction itself carried on a complete railroad business, receiving carload shipments of "dead freight" from the trunk lines and either delivering the same to the consignees, if situated on its tracks, or to the receiving tracks of forwarding trunk lines. Less-than-carload freight was delivered at the freight depot known as the Union Freight Station, the Junction loading it into cars and hauling them to the receiving tracks of the trunk lines.

The trunk lines paid a trackage charge for the use of the tracks leading to the stockyards and, in turn, published a charge of $2 per car, increasing their total rates by that amount for the hauling of livestock from points of origin to the platforms of respondent. Respondent performed the unloading and loading service, supplying the platforms, chutes, pens, and other facilities. It received the waybills thereon from the trunk lines, advanced to them the freight charges, and collected such charges from the consignees.

In an action begun by the United States upon the application of the Attorney General at the request of the Commission to restrain respondent and the Junction from further engaging in interstate commerce until they had filed tariffs as required by section 6 of the act, the Supreme Court held that both respondent and the Junction were common carriers subject to the Interstate Commerce Act.

United States v. Union Stock Yard, supra (December 9, 1912). As a result of this decision, respondent and the Junction filed separate tariffs, those of respondent naming its charges for unloading and loading livestock. The trunk lines amended their tariffs to provide for the absorption of the respective charges published by respondent and the Junction.

In December 1913 the lease above referred to was canceled and a new one was entered into, whereby respondent's railroad facilities, except those used for loading and unloading livestock, were leased in perpetuity to the Junction [fol. 44] at an annual rental of $600,000 in lieu of the two-thirds share in the net profits of operation theretofore received. In May 1917 respondent, by tariffs filed with us, increased its carload charges for unloading and loading livestock from 25 and 50 cents to 50 and 75 cents respectively. The line-haul carriers refused to absorb this extra charge imposed by respondent, with the result that it was exacted from the shippers. Subsequently, respondent filed a cancelation notice, effective September 1, 1917, in which it proposed to altogether withdraw and cancel its tariffs filed with us and to make its charges for loading and unloading livestock the subject of an operating arrangement with the carriers; its grounds for the proposed cancelation being chiefly that, because of the above described changed terms in the lease of its railroad to the Junction, it was no longer a common carrier. Upon protest of certain shippers the cancelation notice was suspended and a hearing was entered upon. Before decision was reached in the suspension proceeding, members of the Chicago Live Stock Exchange brought complaint against respondent and the line-haul carriers, alleging, among other things, that the extra charge for unloading livestock was exacted under an unreasonable practice. In our report in the proceedings, Live Stock Loading and Unloading Charges, 52 I. C. C. 209, we found, among other things, that respondent was a common carrier subject to the act, that its yards were the terminals of the railroads for the receipt and delivery of livestock, and that its proposed cancelation of tariff charges had not been justified. In our report on further hearing (58 I. C. C. 164) we adhered to these findings and also found, in substance, that, by reason of conditions at the Chicago stock yards and the usage of many years, the services of unloading and loading livestock were part of the interstate transportation

included in the rates to and from the yards and that, therefore, the exaction of an extra charge for said services was an unlawful practice. We granted awards of reparation on past shipments in the amount of such extra charge plus interest and the awards were upheld in Adams v. Mills, supra, a decision which has a relation to the question under consideration that will be presently discussed. Respondent's contention in the present proceeding that it is no longer a common carrier subject to the act rests on certain changes subsequent to our decision in Live Stock Loading and Unloading Charges, supra.

On May 19, 1922, the Junction made a lease indenture, joined in by respondent, subleasing the railroad properties held by it under the lease from respondent, and leasing other property, to the Chicago River & Indiana Railway Company, hereinafter called the River Road, for a period of 99 years and thereafter, at the option of the lessee, in perpetuity, the said indenture providing for an annual rental of $2,000,000. All the capital stock of the River Road was at the same time acquired by the New York Central [fol. 45] Railroad Company. Authorization, with certain conditions imposed, of these transactions was granted by us in the Chicago Junction Case, 71 I. C. C. 631, 150 I. C. C. 32.

Respondent, in support of its contention that it is no longer a common carrier subject to the act, advances the following argument: Firstly, that the holding in the Union Stock Yards case, supra, that it was such a common carrier was based upon an intercorporate relationship between respondent and the Junction (operator of the railroad) effectuated by stock control of both companies held by the New Jersey holding company; that, whereas the New Jersey Company still owned practically all the captial stock of respondent and the Junction, nevertheless, by reason of the sublease and lease by the Junction in 1922 of the railroad properties to the River Road, which is now operating them, respondent had ceased to be affiliated with a company operating the railroad; and in effect that, with the cessation of such affiliation its services of unloading and loading livestock, terminating and commencing transportation of the trunk lines, had ceased to be common carriage subject to the act as to the charges named or in other respects; secondly, that its said services and the facilities used therefor were

furnished as agent of the trunk lines operating directly to the yards.

In short, respondent's position is that the court's determination was based on the following: that the Junction was a common carrier subject to the act; that the stock of respondent and the Junction were owned by the same corporation; and that solely because of this intercorporate relationship between respondent and a common carrier subject to the act, respondent was a common carrier subject to the act as to the transportation services for which tariffs had been filed. From these premises, it argues that the destruction of the intercorporate relationship changes respondent's status, and removes it from our jurisdiction, despite the fact that no change has taken place in the services which it performs or the facilities which it operates, as part of the transportation of livestock brought directly to the yards by the trunk lines.

In the Union Stock Yards case, supra, the Supreme Court reviewed at length respondent's history and described in considerable detail the services performed by respondent and the Junction, and stated:

> We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of trans- [fol. 46] portation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the Interstate Commerce Acts.

It does not follow from the fact that the Court, in holding respondent to be a common carrier subject to the act, relied among other things upon the facts that respondent received as rental for its railroad a share of the profits and was otherwise affiliated with the lessee of its railroad, that it would not have reached the same determination in the absence of those facts. In the above paragraph and in other portions of the opinion the Court stressed the fact that the services performed are transportation services within the definition of the act. These services consisted and consist today of the unloading of livestock from railroad cars into unloading pens located on respondent's property and of the loading of livestock from loading pens into railroad cars. Such services have always been performed by respondent's employees, and under respondent's rules the services cannot be performed by persons who are not employed by respondent. The livestock is now, and, except for a period early in respondent's history, always has been, hauled by the trunk lines to the platforms where respondent furnishes the services and facilities to complete the transportation. In the Union Stock Yards case, supra, the Court also said at page 305:

> They [respondent and the Junction] are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them.

In Live Stock Loading and Unloading Charges, supra, respondent's contention that it was no longer a common carrier was not alone based on the fact that the rental it received from the lease of its railroad had been changed from a profit-sharing basis to a fixed annual amount but also on the contention that, although it had been held by the Supreme Court to be a common carrier as to some of its [fol. 47] activities, it was not altogether certain that the Court referred to the particular activities of respondent in connection with shipments of livestock. In that case we held, as aforesaid, that respondent's status as a common carrier had not changed, and that its yards were the livestock terminals of the trunk lines. In a complaint case (consolidated with the main cause) brought by shippers against respondent and the trunk lines we awarded reparation, which was based, it should be noted, on the exaction of a charge for the unloading of livestock in addition to the

charge for the same service included in the rates, our findings being that the extra charge was exacted under an unlawful practice. In Adams v. Mills, supra, the Supreme Court upheld these awards. While the Court did not find it necessary to pass upon the question of respondent's status as a common carrier, the defendants, as a defense against the awards, urged upon the Court that respondent had been held to be a common carrier in the Union Stock Yards case, supra; that this finding had been adhered to by us in the proceeding; that as a common carrier respondent had to publish its tariffs; and that in the absence of a finding of unreasonableness their collection was compelled by law and therefore could not be unlawful. In answer to this the Court said:

But the tariff, as published, authorized only the collection of the charge as a carrier's agent. The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto. Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare Missouri Pacific R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366; Union Stockyards Co. v. United States, 169 Fed. 404, 406.

In short, the question did not relate to the reasonableness of respondent's charge or of the aggregate of charges but to the lawfulness of the practice, jointly pursued by respondent and the railroads, of collecting an extra charge when by long usage the line-haul rates plus the $2 terminal charge had included all transportation service in connection with the shipments. Compare Los Angeles Switching Case, 234 U. S. 294. It did not follow from respondent's status as a common carrier that it could not act as agent of the trunk lines, nor that it was entitled to collect a part of its [fol. 48] charges from the shippers. Any practice other than the inclusion of the whole in the line-haul rates was unlawful.

The unloading and loading of livestock at respondent's yards and the furnishing of the facilities is an inseparable part of the interstate railroad transportation. Respondent not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery. Having attained this status, and thereby having rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common-carrier functions to another corporation.

The trunk lines absorb respondent's charges for its part of the transportation. That fact alone is not enough to relieve it of the status of a common carrier, responsible itself to the provisions of the act. A switching carrier is agent of the line-haul carrier in making delivery particularly when the latter absorbs the whole switching charge, Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366, but it cannot be urged that it is not a common carrier just as much with respect to that switching service as to any other of its services. It has to file its switching charges under section 6, and in performing said switching delivery it has to respond to other provisions of the act. The theory of employment by trunk lines of a connecting carrier to complete delivery of shipments has often been urged as taking from the agent carrier its status as common carrier subject to the act; but in answer, it has been pointed out that the carrier conducts the service for hire and for all whom the trunk lines serve. United States v. Union Stock Yard, supra.

At the time the decision in Union Stock Yards case, supra, was made, section 15 (5) of the act had not been enacted. That provision, which became effective in 1920, reads as follows:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards

shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

[fol. 49] The enactment of this paragraph resulted from respondent's action in 1917 in increasing its unloading charge and the refusal of the line-haul carriers to absorb the increase, with the result that the additional charges imposed by respondent were collected from the consignees. The practices of carriers and stockyards of adding terminal charges to the scheduled railroad rates had been bitterly complained of by livestock shippers, and prior to the enactment of the above paragraph Congress was fully informed of the status of public stockyards and the services which they performed. Senator Cummins, Chairman of the Interstate Commerce Committee, stated that the purpose of the amendment was to require that the series of services rendered in connection with the transportation be performed for a single scheduled rate, and when the conference report on the bill in its final form was made, the House managers stated that the purpose of the amendment was to provide that the through rates on livestock should include unloading and other incidental charges. The legislative history of the paragraph indicates clearly the single purpose to give the Commission authority over services rendered and facilities used in the delivery of livestock at public stockyards.

It will be seen that the service performed by respondent is included in the "transportation wholly by railroad" referred to. Clearly, if performed by the trunk lines, it would be part of the "transportation wholly by railroad"; and, in such case, the fact that unloading and delivery into suitable pens was not factually a rail movement could not be urged to sever such service from the "transportation by railroad" referred to. Is it any the less an inseparable part of the transportation by railroad, when performed by respondent?

We have no doubt that the service that the respondent performs in completing, or commencing, the interstate transportation, is common carriage in that it is conducted for

hire and for all whom the railroads service, even though the latter absorb respondent's charge. It is here denied by respondent that it is a common carrier subject to the act. Since it is not a water carrier, a pipe line, or express company, in order to be a common carrier subject to the act, it must be a common carrier by railroad. We do not understand that those decisions which hold that a carrier cannot be made a common carrier by legislative fiat dispute the right of Congress to include as common carriers subject to the act those who are engaged in the public calling of common carriage. The said decisions simply mean that those who are in fact engaged in a private calling cannot, by legislative fiat, be made common carriers subject to regulation.

For purposes of including the service of delivery into suitable pens as part of the whole railroad transportation to be rendered the shipper without extra charge, the fact that such service is performed by respondent would not [fol. 50] sever the service from the transportation by railroad. Since respondent performs the service as common carriage, there is no reason, from a legal standpoint, why, as so performed, Congress' declaration that it is part of the railroad transportation should not still be given effect. There is a great deal of reason for so doing from the standpoint of giving full effect to the remedial purpose of section 15 (5). The fact that the railroads must proffer the service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable. If respondent doubles its present charge of $1.25, it must still be absorbed. Either the railroads must bear the increase or pass it on to the shippers in an increased through rate. It has been urged that the Secretary of Agriculture would have jurisdiction over the charge. We are of the view that he would not have such jurisdiction whether or not the same is reposed in the Commission. The decision in Atchison T. & S. F. Ry. Co. v. United States, supra, reads at p. 201:

Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that

jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

In the above case the Court had said that "at least in respect of these shipments" transportation ended with unloading into suitable pens. While this does not purport to be a definite statement as to where transportation ends in the case of all shipments, it is a definite holding that the boundary of the Secretary's jurisdiction "is the place where transportation ends," and under section 15 (5) of the act it is clear that transportation could not end short of delivery into the unloading pens. The Court is speaking, it will be noted, of the charges of respondent and not of the railroads' rates and charges against shippers.

For the reasons above given we believe that it must be concluded that respondent, in performing the described services commencing or terminating interstate transportation by railroad, is a common carrier subject to the act. Such services expressly made by the act parts of the railroad transportation to be furnished by the railroads, the latter absorbing the charge therefor without making a separate charge against shippers, were not intended to be left for "barter and trade" like the purchase of fuel or of rolling stock or the making of contracts for construction. We do not entertain the view that every terminal agency, performing for the railroads some service falling within the definition of "transportation" contained in section 1 [fol. 51] (3) could, or should, be held to be a common carrier subject to the act. The views expressed relate to the subject matter which is before us, namely, the services performed by the Union Stock Yards, and rest, not only on the Union Stock Yards case, supra, but also on the language of section 15 (5) and the giving of harmonious effect to its purpose. The Supreme Court, in holding respondent to be a common carrier, referred not alone to its affiliation with the lessee of its railroad and to the fact that the services and facilities furnished by it were "transportation," but also emphasized, as above shown, that respondent and the Junction were "common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them." Although respondent's pecuniary interest in

its railroad is now in the form of a fixed annual rental, it is very substantial. In the contemplation of its charter it is still engaged in the "public callings" of operating public stock yards and a railroad as an adjunct thereto. In Live Stock Loading and Unloading Charges, supra, we held respondent to be, in effect, the terminal of the line-haul carriers and that conclusion was upheld by the Supreme Court in Adams v. Mills, supra, page 409. Respondent not only holds itself out to perform the "transportation" in question, constantly acting in that capacity, but insists upon doing so.

The services performed and facilities furnished by respondent were, at the time of the decision in the Union Stock Yards case, an inseparable part of the railroad transportation. And now this has been rendered more than ever true by the declaration in section 15 (5) of the act, that transportation wholly by railroad shall include delivery at public stockyards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments, without extra charge to the shipper. While, doubtless, the emphasis of the amendment is laid on the making of no extra charge, its purpose of obtaining that result is secured by declaring that the transportation by railroad shall include such service. We do not think that a harmonious construction of the statute results from, on the one hand, an indisputable jurisdiction over the prescribed delivery into suitable pens, the same having to be treated as an inseparable part of the rail transportation to be furnished by the railroads without separate charge, and on the other hand, the assumption that we are without jurisdiction over respondent in performing such part of the transportation and its charges therefor which must be included in the line-haul rate. The Packers and Stockyards Act, August 15, 1921, expressly provides that nothing therein shall affect our jurisdiction or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within our jurisdiction. It is plain that Congress did not intend a neutral zone of no jurisdiction over respondent's charges and it is equally plain from the statement above quoted [fol. 52] from Atchison, T. & S. F. Ry. Co. v. United States, supra, that jurisdiction over respondent's charges to "the place where transportation ends" was left with us.

Pursuant to the regulatory processes of the Interstate Commerce Act, respondent's charge for unloading livestock

has been increased from 25 cents per car, where it stood for many years, to its present level of $1.25. Following the amendment contained in section 15 (5) of the act, the trunk lines filed supplements to their tariffs absorbing the increase from 25 cents to 50 cents, involved in Adams v. Mills, supra. In Livestock Loading and Unloading Charges, (1921) 61 I. C. C. 223, a further increase to $1 was authorized. In 1923 and subsequent to the sublease of its railroad to the River Road, which is here asserted as rendering respondent no longer a common carrier subject to the act, our jurisdiction was invoked, and exercised, in respect of a proposed increase from $1 to $2. Following hearing upon protest, the proposed increase was found not justified. Livestock Loading and Unloading Charges, 83 I. C. C. 248. Later respondent filed a supplement to its tariffs proposing to increase the charge to $1.25, which was not protested and became effective December 14, 1934. These several increases in respondent's charges show that our jurisdiction has been availed of, and has been exercised, very recently.

Respondent's second principal contention is that, since it performs the service of loading and unloading, as the agent of the line-haul carriers, it is not a common carrier itself. This contention, already fully discussed, is shown to be without merit by numerous decisions of the Supreme Court. Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., supra; United States v. Union Stock Yard, supra.

As above mentioned, in Adams v. Mills, supra, the Supreme Court said that it did not follow from the status of respondent as a common carrier "that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers," citing Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., supra. The issue under consideration was as to the lawfulness of the practice whereby a charge for unloading livestock other than as embodied in the line-haul rates, was exacted from shippers. The matter of immediate interest is the Court's reference to the last-mentioned case, in which a switching carrier, whose published switching charge was absorbed by the line-haul carrier, was held to be agent for the line-haul carrier in completing delivery. This analogy, drawn between respondent's service and that of switching carrier, in completing a transportation is, we believe, particularly apposite here. Although a measure of competition exists between carriers, including switching carriers, one thing

that made regulation of their charges necessary was that, in respect of a great deal of their service, competition was [fol. 53] absent. While a switching carrier, making delivery of a shipment to an industry located on its line, is agent of the line-haul carrier, its switching charge is subject to regulation. Under the conditions existing at Chicago respondent's yards are substantially the sole terminal in Chicago for the receipt of livestock and, as to the unloading of shipments destined to the yards, the railroads have to employ respondent to perform the service. Consequently the freedom of bargaining commonly entering into the creation of the usual relationship of principal and agent is not possible. Respondent is agent of the line-haul carriers precisely as is a switching carrier completing delivery for a line-haul carrier because it, too, is a common carrier whose charges are subject to regulation.

We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago.

We further find that the schedules in which it proposes to cancel its tariffs on file with us are not justified. An order will be entered requiring cancelation of the suspended schedules and discontinuing this proceeding.*

AITCHISON, Commissioner, concurring:

Accepting the ruling on evidence to be the law of the case, as it has been passed upon by the Commission, I concur in the result. However, I believe the objection to the testimony offered should have been overruled, as it appears to me to be relevant and material. What the decision would be with the proffered evidence before us can not now be determined.

Commissioner Meyer dissents for reasons stated in his dissent in Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330.

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* Commissioner Meyer dissented and his dissent is shown in 213 I. C. C. at page 342. Commissioners Aitchison, Eastman, Lee and Tate did not participate in the disposition of this proceeding.

EASTMAN, Commissioner, dissenting:

The issue in this case is not likely to be set at rest until it is passed upon by the Supreme Court, and without doubt [fol. 54] it will be adequately presented to the court by the parties in interest. I shall therefore state my conclusions briefly, without undertaking to support them by any lengthy argument or citation of authorities.

The Yard Company, in my judgment, is not now a common carrier by railroad. Past decisions of the Supreme Court that it was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central.

The facts that the Yard Company has a remote reversionary interest in part of the line of railroad, and that it has charter power to operate a railroad, including the right of eminent domain, do not make it a carrier by railroad. That is dependent upon what it does. Such attendant circumstances are at times of significance in determining the nature of what is done, but not otherwise. Nor is the Yard Company a carrier by railroad because, in the lease, it covenants to exercise its right of eminent domain at the request and for the benefit of the lessee. That covenant is, in substance and effect, equivalent to a transfer of the right to the lessee along with the property.

The loading and unloading of the livestock at the stockyards is a railroad service, and we have full power to regulate the charges which are levied upon shippers for this service, whether they are separate charges or included with the line-haul rates. In such regulation we may be guided by the reasonable cost of the service, if we find its actual cost to be unreasonable. The fact, however, that it is the duty of a railroad to deliver livestock at public stockyards [fol. 55] into pens and to make sure that the latter are "suitable" does not make the pens railroad premises, any more than the delivery by a motor carrier of shipments into the home or place of business of a consignee makes that home or place of business motor carrier premises.

There is nothing to prevent a railroad, where it has the duty of loading and unloading freight, from performing the duty through an agent, and that is often done. In no instance that I know of, other than that now before us, has it been contended that an agent so employed by a railroad

for the loading and unloading of freight is, because of such agency and employment, a carrier by railroad. Here, however, the railroads have no option save to employ the Yard Company. The latter insists on performing the loading and unloading service and is in a position to enforce its desires in that respect. The result is that the railroads have no opportunity to perform the service directly with their own employees or, by obtaining competitive bids or similar procedure, to employ whatever agent is found willing to undertake the service for the lowest price. There is fear, therefore, that unless we can regulate the charges of the Yard Company, it will exact from the railroads exorbitant compensation which will, in turn, afford the railroads a reason for demanding an increase in their line-haul rates on livestock to Chicago.

This fear, I believe, underlies the decision of the majority, and I am not prepared to say that it is a baseless or unreasonable fear, if the charges of the Yard Company for this service are to go unregulated. That is, of course, not a reason for finding that the Yard Company is a carrier by railroad, but only goes to show that a situation exists which may be in need of remedy, perhaps by further legislation.

[fol. 56] It is by no means clear, however, even if the Yard Company is found not to be a carrier by railroad, that the charges which it makes against the railroads for the loading and unloading service will not be subject to public regulation. While that question is not for us to decide, it is so linked and involved with the question that is in issue that I venture to discuss it briefly.

Why is it that the Yard Company is in a position to insist upon loading and unloading the livestock for the railroads and therefore to enjoy a virtual monopoly of this employment? The answer to this question, I take it, lies in the fact that the Yard Company is a public stockyards and that the loading and unloading of the livestock is so intimately related to the proper conduct of that public business that it cannot well be divorced therefrom and placed under separate supervision. As I see it, therefore, although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.

While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. So far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for [fol. 57] them, at a public stockyards, by those in charge of the stockyards, because it is an inextricable part of stockyards service. It follows, therefore, that the charges made against the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act.

From an administrative standpoint, the division of duties which would result from this construction of the law would simplify matters, in comparison with the situation which will result from the decision of the majority. Under the latter decision, the Yard Company will be partly under the jurisdiction of this Commission and partly under the jurisdiction of the Secretary of Agriculture, involving much duplication of work. On the other hand, under the construction of the law which I believe to be sound, the Yard Company would be wholly under the jurisdiction of the Secretary of Agriculture.

Carriers employ agents for many purposes and under many different conditions. No uniform rule can be applied in determining the legal status of such agents, for it varies with the circumstances. The conclusions which I have here reached as to the status of the Yard Company as a railroad agent are governed by the particular circumstances of this case.

I may add that I believe the Commission was in error in its ruling, described in the majority report, with respect to the admissibility of certain evidence proffered by respondent.

[fol. 58] PORTER, Commissioner, dissenting:

The fundamental contention of the Yard Company is that it is no longer a common carrier subject to the Interstate Commerce Act and therefore is not required by the provisions of that Act to file tariffs with the Commission.

The requirements of section 6 as to printing, posting, and filing tariffs applies only to "common carriers subject to the provisions of this Act." If the Yard Company is not now a common carrier subject to the Act it may lawfully cancel the tariffs.

Section 1 of the Act in paragraph 1 provides that its provisions shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, etc., and to certain transportation by pipe line, etc., in interstate commerce, etc. Paragraph 3 of section 1 provides that "The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." The same paragraph also defines the terms "railroad" and "transportation" by providing that those terms as used in the Act shall include certain things, but of course those definitions do not give the Commission jurisdiction over types of common carriers other than those specified earlier in paragraph 3 and in paragraph 1.

If the Yard Company is subject to the Act at all it must be because it is a common carrier engaged in the transportation of property wholly by railroad, since there is no intimation that it is so engaged by any of the other means specified in section 1.

[fol. 59] The record in the present case discloses that the Yard Company does not now operate any railroad tracks or equipment. In other words, I can not find that it is literally within the provisions of section 1, paragraph 1, as a common carrier engaged in the transportation of passengers or property by any of the means there specified.

In United States v. Union Stock Yard, 226 U. S. 286, the Supreme Court held that the Yard Company was then a common carrier subject to the Act. In so holding the court rested its decision upon the fact that the Yard Company and the Chicago Junction Railway were closely affiliated by the ownership of practically all of the shares of both by the New Jersey holding company. At that time the Chicago Junction Railway was the operator as lessee of the railroad properties owned by the Yard Company. The Yard Company as a separate corporate entity was not engaged as a common carrier by railroad, but it was so closely affiliated with the railroad through ownership of the

stock of both by the holding company that all three were deemed by the Supreme Court to be practically one concern. The courts have often disregarded corporate form and looked to the substance. Since that decision material changes have taken place. The railway properties owned by the Yard Company (which had been leased to the Chicago Junction Company) have since been leased to the Chicago River & Indiana Railway Company and all of the capital stock of the latter company has been purchased by the New York Central Railroad Company, these transactions having been approved by the Commission in the Chicago Junction Case, 71 I. C. C. 631, Finance Docket No. 1165, decided May 16, 1922, subject to the 17 conditions there specified, one of which (No. 14) was later modified in [fol. 60] a supplemental report, 150 I. C. C. 32. The present record shows that this lease and purchase of stock were effected May 19, 1922, immediately after the report of May 16, 1922.

So that the connection between the Yard Company and the operator of the railroad has been severed. It is true the Yard Company is still affiliated with the corporation, the Chicago Junction Railway Company, but the latter is no longer the operator of the railway. It now occupies merely the status of a non-operating lessor company. At this time there is no affiliation through stock ownership between the Yard Company and the operator of the railroad. It can not now be said that the Yard Company and the railway operator are practically departments of the same concern. The investment company no longer holds the controlling interest in both the Yard Company and the railway operator. The Supreme Court could not now say, as it did in the 226 U. S. 286, that "these companies"—referring to the Yard Company and the Chicago Junction Railway Company—"because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act.' In referring to the "service rendered" by the two companies the Court obviously did not have in mind merely the loading and unloading service. It had in mind the service previously referred to in the opinion, namely, both the loading and transporting,

the Court having previously said that the Yard Company and the Chicago Junction Railway, together, as to freight which is being carried in interstate commerce, engage in [fol. 61] transportation within the meaning of the Act and perform services as a railroad when they take the freight delivered to the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce.

It seems obvious from the opinion that the Court could not find the Yard Company to be a "common carrier by railroad" by reference to its service, status, and activities considered separately and apart from those of the railroad.

It may be noted that the Commission, in holding in Live Stock Loading and Unloading Charges, 52 I. C. C. 209, decided February 11, 1919, that the Yard Company was still a common carrier, relied upon the affiliation between that company and the Chicago Junction Railway as the operator of the Yard Company's railway. After reviewing the Supreme Court decision in 226 U. S. —, the Commission said, pp. 214-215:

The only difference as to the relationship then and now existing between the two companies is that then the Chicago Junction Railway held a 50-year lease with approximately 35 years to run and paid two-thirds of its profits to the stockyard company as rental, whereas it now has a lease in perpetuity and pays $600,000 per year as rental. The character of service rendered has not changed. The complementary relation of the stockyard company to the Chicago Junction Railway Company is now as it was in 1912. The stock of both companies is owned by a holding company with control of both organizations and it is of no more real consequence to the actual owner of these companies which one makes a profit than it is to a man in which pocket he carries his money. The relation of these two companies to each other and to the holding company controlling both and the respective services performed by each in connection with shipments of live stock can not now [fol. 62] be held to be essentially different from the conditions existing in 1912. The inevitable conclusion is that the stockyard company is now, as to shipments of live stock to and from the stockyards, a common carrier engaged in interstate commerce and subject to the provisions of the Interstate Commerce Act.

In its supplemental report in Live Stock Loading and Unloading Charges, 58 I. C. C. 164, in which the Commission adhered to its finding that the Yard Company was still a common carrier engaged in interstate commerce, the Commission again relied upon that affiliation. It is there stated, pages 166-167:

In United States v. Union Stock Yard, 226 U. S. 286, the Supreme Court held that the stockyard company was a common carrier. At the time of that decision there existed a lease between the stockyard company and the Chicago Junction Railway, hereinafter called the Junction company, which had about 35 years to run, by the terms of which the stockyard company granted all its railroad property to the Junction company and for which the latter paid two-thirds of its profit as rental. Shortly after that decision this lease was cancelled and the parties entered into a new lease under the terms of which the Junction company was granted, in perpetuity, all the property covered by the former lease, for which it agreed to pay a rental of $600,000 per year. The character of the service has remained the same. The change in the lease has made no practical change in the status of the stockyard company since the decision of the Supreme Court. We adhere to our finding that the stockyard company is a common carrier engaged in interstate commerce.

Both of the reports in that proceeding were rendered prior to the changes of 1922 referred to above. The Com- [fol. 63] mission's reparation awards therein were sustained by the Supreme Court in Adams v. Mills, 286 U. S. 397, 415, and the decision there recognized the common carrier status of the Yard Company, but necessarily that decision rested upon the record before the Commission, which was as of a time prior to the 1922 changes and the decision made no reference to those changes. In the Hygrade case, A., T. & S. F. Ry. Co. v. United States, 295 U. S. 193, 8 F. Supp. 825, 195 I. C. C. 553, involving yardage charges at the Chicago stock yards, neither the Commission nor the courts passed upon the Yard Company's contention that it was no longer a common carrier.

The conclusion is inescapable that the changes which have taken place since the Supreme Court's and the Commission's decisions above referred to have removed the basis of

those decisions and that they are no longer authority for holding the Yard Company to be a common carrier subject to the Act. Are there any other grounds upon which it can now reasonably be held that the company is subject to the Act?

It is indisputable that the loading and unloading service is transportation service. Transportation is defined in section 1(3) as including, among other things, all services in connection with the receipt and delivery of property transported, which of course embrace loading and unloading. Moreover, by section 15(5) transportation by railroad of ordinary livestock in carload lots destined to or received at public stock yards is projected to suitable pens within the yards. Under that provision transportation of this particular kind of freight does not end until it is unloaded and placed in suitable pens within the public stock yards. When the Yard Company performs the loading and unloading it undeniably performs a transportation service. But this fact [fol. 64] standing alone does not make it a common carrier by railroad subject to the Interstate Commerce Act. The Yard Company would have the same control over the loading and unloading that it would have if it had never been a common carrier. The platforms, chutes, pens, and other facilities used in loading and unloading are the properties of the Yard Company. It is not compelled to allow either the shippers or the railroads to use these properties, certainly not without compensation. It, like any other public stock yard company, can insist upon performing this service and making a charge therefor. If it be said that the Yard Company is a "common carrier by railroad" because it performs this loading and unloading service, then it would follow that every public stock yard in the country that performs similar service is a common carrier by railroad subject to the Act and must file tariffs and annual reports and otherwise comply with all the applicable provisions of the Act. This seems to me to be untenable.

In Union Stockyards Co. of Omaha v. United States, 169 Fed. 404, it was held that a stockyard company which owns and maintains at a large shipping point an extensive stockyard which is in effect the livestock depot of all the railroad companies doing business at that point, and which owns and maintains several miles of railroad tracks extending over its own premises from its stockyards to a transfer track (also on its own premises) connecting with the several tracks

of the railroad companies, and which by means of its own locomotives and servants transports for hire over its tracks all shipments of live stock accepted by the railroad companies for carriage to and from such stockyards, including such shipments as are interstate, is a common carrier en- [fol. 65] gaged in interstate commerce by railroad within the meaning of the safety appliance law of Congress. But in the course of the opinion it was conceded that—

the stockyards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined.

Previously, in Cotting v. Kansas City Stock Yards Co., 82 Fed. 839, it had been held that the interstate commerce law applies only to common carriers and its provisions are not applicable to the business of a stockyards company which neither operates nor uses any railway motive power or rolling stock, nor otherwise engages in any transportation.

Although a stockyard company may own and operate railway tracks and transport interstate shipments over them, it is not necessarily a common carrier. The Commission so held in A., T. & S. F. Ry. Co. v. Kansas City Stock Yards Co., 33 I. C. C. 92.

Section 1 of the Act specifies what transportation shall be subject to its provisions. Not all transportation is so subject, but only transportation performed by common carriers of the kinds there specified, namely, wholly by railroad, partly by railroad and partly by water, etc. Paragraph (2) of section 1 provides:

The provisions of this Act shall also apply to such transportation of passengers and property, but only so far as such transportation takes place within the United States • • •.

[fol. 66] As held by the Commission in Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539, the words "such transportation" in paragraph (2) can only refer to the transportation of passengers or property by the common carriers described in the preceding paragraph. In the same report (p. 546) the Commission said: "It is to be noted that the application of the provisions of the Act is

limited to certain classes of common carriers expressly named and specified, * * *."

The Yard Company performs certain services in connection with the receipt and delivery of property transported, namely, the loading and unloading of livestock shipped from and delivered at the Union Stock Yards by common carriers by railroad in interstate commerce, and plainly, therefore, it performs a transportation service, but this fact alone would not bring it within the provisions of the Act. A carrier may employ any person to perform its loading and unloading service, but the fact of such employment or agency does not alone make that person a common carrier. Often this service is performed by the shipper, and if under the circumstances it is the duty of the carrier to perform the service, then the shipper is performing for the carrier a part of its transportation service and may be compensated therefor under the provisions of section 15(13), as in the Diffenbaugh case, 222 U. S. 42, and many others. But this fact does not make the shipper a common carrier subject to the provisions of the Act. The service itself is subject to regulation by the Commission by orders addressed to the railroad company. See Strauss & Adler v. New York C. R. Co., 153 I. C. C. 609, 188 I. C. C. 487; Allied Packers v. Atchison, T. & S. F. Ry. Co., 161 I. C. C. 641; compare Spencer Kellogg & Sons v. U. S., 20 Fed. (2) 459, certiorari denied, 275 U. S. 566.

[fol. 67] In many instances throughout the United States independent stockyards companies (not owned or controlled by the railroad companies) perform the service of loading and unloading livestock for the railroads, as at Benning, D. C. (see Adolph Gobel, Inc. v. Baltimore &O. R. Co., 200 I. C. C. 606), and at Cincinnati (see E. Kahn's Sons Co. v. Baltimore & O. R. Co., 192 I. C. C. 705), but the Commission has never asserted jurisdiction over these stockyards companies on this ground.

On the other hand, stockyards companies have been held to be common carriers where they are operators of railroad tracks and participate over such tracks in the transportation of property in interstate commerce, as in Union Stock Yards Company of Omaha v. United States, supra. Another similar case is United States v. Sioux City Stock Yards Co., 162 Fed. 556, in which it was held that the stockyards company was a common carrier by railroad within the meaning of the 28-hour law, upon a showing that in addition to

carrying on its business as a stockyards company, it had acquired real estate and constructed some seven miles of railroad tracks thereon, and owned three locomotives which it operated with its own employees upon such tracks in hauling cars of all railroad companies entering Sioux City loaded with livestock destined for the market at that place, and all cars loaded at that place with livestock or packing-house products consigned to other markets.

Likewise, wharfage companies have been held to be common carriers subject to the Act where they operate railroad tracks, however short, and participate over such tracks in the interstate transportation by rail, as in Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498, sustaining the [fol. 68] order of the Commission in Eichenberg v. Sou. Pac. Co., 14 I. C. C. 250, and In re Wharfage Charges of Galveston Wharf Co., 23 I. C. C. 535.

In New York Dock Ry. Co. v. Baltimore & O. R. Co., 73 I. C. C. 656; Excess Income of Brooklyn Eastern District Terminal, 94 I. C. C. 577; United States v. Brooklyn Eastern District Terminal, 249 U. S. 296; and Stanley v. Jay Street Connecting Railroad, 166 N. Y. 119, 169 N. Y. 530, companies performing terminal services were held to be common carriers by railroad. In each of those cases the company operated a railroad. Compare Humboldt S. S. Co. v. White Pass & Yukon Route, 25 I. C. C. 136; Wharfage Handling and Storage Charges, 59 I. C. C. 488. The first prerequisite to a finding that a company is a common carrier by railroad subject to the Act is obviously that it be actually a carrier over railroad tracks.

In Enterprise Transportation Co. v. Penn. R. R. Co., 12 I. C. C. 326, decided July 8, 1907, the Commission, speaking through Commissioner Prouty, said:

Bridges, ferries, switches, and terminal facilities are declared to be included within the term 'railroad' not for the purpose of exempting them from any liability to publish and observe their rates when such ferries or bridges are operated by their owners as common carriers, but rather to make certain that where these agencies are employed by railroads the transportation service rendered by them shall still be subject to the provisions of the Act to regulate commerce. It often happens that bridges are constructed and terminal facilities provided by independent companies, which lease them to railroad companies under various con-

ditions. The intent of the first section was to insure that the carriage of freight and of passengers should be subject to the Act from its inception to its conclusion and that the [fol. 69] jurisdiction of the Government over such transportation should not be divested by that fact that any agency used in the transportation was furnished by some party other than the common carrier itself.

* * * * * * *

A railroad company may without doubt provide by contract with an independent company for the construction of a bridge or a ferry to be used as a part of its line. It can perhaps extend its contract to the operation of the bridge or ferry by its owner when constructed; but in such case the bridge company or the ferry company is not a common carrier. The railroad is the carrier and answerable to the law as such. The bridge or the ferry is really a part of the railroad itself as much as though owned by it. (pp. 335-336.)

Ellis v. I. C. C., 237 U. S. 434, involved the question whether the Armour Car Lines was a common carrier. The decision states, page 443, that the Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, tank, and box cars and that leases these cars to the railroads or to shippers. "It also owns and operates icing stations on various lines of railway, and from these ices and reices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally, it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act." The court further said—

[fol. 70] * * * It is true that the definition of transportation in section 1 of the Act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary

to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the Act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself.

It will be noted that the test there applied was whether the Armour Car Lines was in fact a carrier, that is, whether it carried anything. Here the Union Stock Yards, which does not operate a single foot of railroad, is in fact not a carrier by railroad. True, it still owns the railroad, and under section 20 of the Act may be required to file annual reports with the Commission, for that section empowers the Commission to require annual reports not only from common carriers subject to the provisions of the Act, but also "from the owners of all railroads engaged in interstate commerce as defined in this Act." But owners of railroads are not subjected to the other provisions of the Act by section 1, and where an owner of a railroad has leased it to another, as in the present case, he is not a common carrier by railroad.

Commissioner Lee did not participate in the disposition of this proceeding.

[fol. 71] Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of July, A. D. 1938

Investigation and Suspension Docket No. 4296

Cancelation of Livestock Services at Chicago

It appearing, That by order dated January 11, 1937, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until August 15, 1937, and that respondent has subsequently voluntarily postponed the operation of said schedules until January 1, 1939;

It further appearing, That a full investigation of the matters and things involved has been made, and that the com-

mission on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondent herein be, and it is hereby, notified and required to cancel said schedules, on or before August 17, 1938, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

By the commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 72] EXHIBIT "G" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4109 Livestock Loaded and Unloaded at Chicago

Submitted October 1, 1935. Decided December 11, 1935

Union Stock Yard & Transit Company found to be a common carrier subject to the provisions of the Interstate Commerce Act. Proposed cancelation of its tariffs naming loading and unloading charges on livestock at Union Stock Yards, Chicago, Ill., found not justified. Suspended schedules ordered canceled and proceeding discontinued

Mark W. Potter and Ralph M. Shaw for respondent.

Kenneth F. Burgess and Douglas F. Smith for The Alton Railroad Company, Chicago & Eastern Illinois Railway Company, Chicago & North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Chicago, Rock Island & Pacific Railway Company, Illinois Central Railroad Company, Minneapolis, St. Paul & Saulte Ste. Marie Railway Company, Wabash Railway Company, and Atchison, Topeka & Santa Fe Railway Company, protestants.

[fol. 73] Report of the Commission

[See Appendix, Exhibit F. for Report of Commission]

MEYER, Commissioner, dissenting:

If the conclusions set forth in this report be sound, this Commission has jurisdiction over every stockyard in the United States. I am not persuaded that Congress has given us such jurisdiction. I had supposed that the Department of Agriculture had been given jurisdiction over all charges for stockyard services, and that the fact that loading and unloading livestock are transportation services within the meaning of the act does not make every agent who performs such services a common carrier by railroad subject to the act. An individual may, and often does, perform for a common-carrier railroad a portion of its transportation service, but this does not make the individual who, like the Stock Yards Company, operates no railroad, a common carrier by railroad. In Docket No. 7008, Atchison, T. & S. F. Ry. v. Kansas City S. Y. Co., 33 I. C. C. 92, this Commission unanimously held that the Kansas City Stockyards Company was not a common carrier engaged in interstate commerce. Although many changes have taken place since that time, the basic principles discussed and relied upon therein are as sound today as they were then. The instant report is a reversal of those principles.

If it is thought that this Commission should have jurisdiction over all services and charges of all stockyards, whether common carriers or not, we should ask Congress, rather than the Supreme Court, to bestow that jurisdiction upon us.

[fols. 74-79] EXHIBIT "H" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 19th day of July, A. D. 1938.

Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of telegraphic

request of respondents for postponement of the effective date of the order:

It is ordered, That the order entered herein on July 11, 1938, which was by its terms made effective on August 17, 1938, upon not less than one day's notice, be, and it is hereby, modified to become effective on October 1, 1938, upon not less than one day's notice instead of said August 17, 1938.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Aug. 23, 1938

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

The Commission admits that the allegations contained in paragraph 1 of the bill of complaint are correct.

[fol. 81] II

Answering paragraphs 2 to 16, inclusive, of the bill of complaint, the Commission admits and alleges that it made the order of July 11, 1938, referred to in paragraph 11 of the bill of complaint, in a proceeding instituted by the Commission pursuant to a complaint filed in the Commission's office by and on behalf of certain common carriers by railroad, named in paragraph 9 of the bill of complaint, said proceeding being designated Investigation and Suspension Docket No. 4296, for the purpose of determining whether

plaintiff had ceased to be a common carrier, and should be permitted to cancel its tariffs on file in the Commission's office naming and relating to charges for loading and unloading livestock at the Union Stock Yards at Chicago in the State of Illinois. Said order and the report referred to therein and made a part thereof are attached to the bill of complaint as Exhibit F, and the Commission refers said court to such order and report for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said order was submitted to the Commission for consideration, by the counsel of said parties; that at said hearing and subsequently, [fol. 82] both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and duly served upon the parties to said proceeding, its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions, orders and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order of July 11, 1938, are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that said order of July 11, 1938, the effective date of which has been modified by the

Commission since the order was made, was not made or en-
[fol. 83] tered either arbitrarily or unjustly, or contrary to the relevant evidence or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

The Commission specifically denies allegations contained in paragraphs, 8, 13 and 14 of the bill of complaint, namely: that plaintiff is not a common carrier by railroad or otherwise; that plaintiff is not a common carrier subject to the provisions of the Interstate Commerce Act, and that plaintiff is not subject to the jurisdiction of the Commission.

The Commission specifically denies that the allegations contained in paragraph 10 of the bill of complaint, which describe matters pertaining to shipments of livestock by railroad to and from points in the United States other than Chicago, and which plaintiff alleges it endeavored to have made a part of the record in said proceeding as evidence, but was prevented from doing so by the Commission, were pertinent and material matters in connection with the subject matters of complaint involved in said proceeding. In this connection the Commission alleges that the matters first above referred to in this paragraph simply pertain to the manner in which livestock transported by railroad was handled at stock yards in the United States other than Chicago, while the matters involved in said proceeding re-
[fol. 84-86] lated only to livestock transported by railroad and the loading into and unloading from cars thereof at the Union Stock Yards at Chicago.

The Commission specifically denies each of and all the allegations contained in paragraph 14 of the bill of complaint.

The Commission specifically denies that plaintiff will suffer irreparable damage, unless said order of July 11, 1938, is enjoined, set aside, and annulled and suspended by the court, as alleged in paragraph 15 of the bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of July 11, 1938.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, By Daniel W. Knowlton, Chief Counsel.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed Sept 21, 1938

United States of America, one of the defendants in the above entitled cause, for answer to the bill of complaint filed herein against it, answers and says:

I

United States admits that the facts alleged in paragraphs numbered 1, 2 and 3 of the bill of complaint are true; but, further answering said paragraphs, United States alleges that said service of loading and unloading live stock which is performed by plaintiff, as alleged in said paragraph 3, is a part of the service of transportation of live stock by railroad, and, as such, is subject to the jurisdiction of the Interstate Commerce Commission; and United States further alleges that plaintiff owns, furnishes and operates the facilities employed in the rendition of said transportation service.

II

United States admits for the purposes of this suit that the facts alleged in paragraphs numbered 4, 5, 6, and 7 of the bill of complaint are true except that United States alleges that plaintiff still and now owns and operates the [fol. 88] facilities consisting of platforms, chutes, and pens used in loading and unloading live stock, and has always operated and now operates those facilities in performing that transportation service.

III

United States denies the matters, things and conclusions in manner and form as alleged in paragraph numbered 8

of the bill of complaint and will demand strict proof thereof upon the trial of this cause.

IV

United States admits the truth of the facts alleged in paragraph numbered 9 of the bill of complaint.

V

Answering paragraph numbered 10 of the bill of complaint, United States admits, as stated in the Commission's report which is annexed to the bill of complaint as Exhibit F, that at the hearing before the examiner mentioned in said paragraph plaintiff sought and attempted to introduce evidence substantially as described in the allegations of said paragraph and for the purposes therein alleged; that said examiner refused to admit the evidence so offered by plaintiff or to include such evidence in the record as a part of plaintiff's offer of specific proof; but alleges that plaintiff was afforded the opportunity of describing in the record the character of the evidence sought to be introduced and what it purported to show and that plaintiff availed itself of that opportunity; admits that plaintiff filed a petition with the Commission to review the rulings of said examiner upon such proffer of evidence and praying that the Commission instruct said examiner to receive such evidence in the record, and that the Commission considered said petition, and upon consideration of the character of the evidence offered, affirmed the rulings of said Examiner and denied said petition on November 8, 1937; but United States denies the allegation in said paragraph that the conduct of said hearing by said examiner in the respects just [fol. 89] mentioned was arbitrary, unreasonable and contrary to law.

VI

United States admits that the facts alleged in paragraphs numbered 11 and 12 of the bill of complaint are true and for full and complete information concerning the Commission's report and orders mentioned in said paragraphs, the court is respectfully referred to the full text thereof, annexed to the bill of complaint as Exhibits F and H.

VII

Answering paragraph numbered 13 of the bill of complaint, United States denies the allegations contained in

the first sentence thereof, and admits the remaining allegations of said paragraph 13.

VIII

United States denies the matters, things and conclusions alleged in paragraph numbered 14 of the bill of complaint and denies that the Commission's said order is unlawful or void for the reasons therein alleged, or for any other reason.

IX

Answering paragraph numbered 15 of the bill of complaint, United States admits that the allegations thereof are true, except that it denies that obedience by plaintiff of the Commission's said order will deprive plaintiff of "large sums of money to which it otherwise might become entitled; and will require plaintiff to expend large sums of money in order to comply with said final order" and further denies that compliance with said order will cause irreparable damage to plaintiff or any legal damage whatever.

X

Answering paragraph numbered 16 of the bill of complaint, United States admits that plaintiff's remedy to review the Commission's said order is by way of this suit under the provisions of Urgent Deficiency Appropriation Act (38 Stat. L. 219).

[fols. 90-102]

XI

Except as herein expressly admitted, United States denies each and every allegation contained in the bill of complaint and in the several separate paragraphs thereof.

Wherefore, having fully answered, United States prays that the relief sought by the bill of complaint be denied and that the bill of complaint be dismissed at the cost of the plaintiffs, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General, Thurman Arnold, Assistant Attorney General. M. L. Igoe, United States Attorney. Earl C. Hurley, Assistant United States Attorney.

[fol. 103] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO INTERVENE AS PARTIES DEFENDANT—Filed September 22, 1938

To the Honorable Judges, Evan A. Evans, Charles E. Woodward and Philip L. Sullivan, Constituting a Three-Judge Court:

Now come Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and move the court for leave to intervene in this action in order to assert the defenses set forth in their answer, which accompanies this motion and is made a part hereof, and of which [fol. 104] a copy is hereto attached, and in support of said motion show as follows:

1. That the complainant in the above entitled cause involves the validity of a certain order of the Interstate Commerce Commission entered by the said Commission on July 11, 1938, in its Investigation and Suspension Docket 4296, "Cancellation of Live Stock Services at Chicago", in that the said complaint seeks to enjoin, set aside, annul and suspend the said order entered pursuant to the report of said Commission issued at the same time, which order and report are annexed to and made a part of the complaint, as Exhibit "F" thereof, and which order and report are hereby made a part of this motion by reference.

2. That, with the exception of G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, all the said applicants for intervention were parties in interest to the said proceeding before the Interstate Commerce Commission as is averred in paragraph 9 of the complaint, and as fully shown by the

said order and report of the Commission dated July 11, 1938; that Minneapolis, St. Paul & Sault Ste. Marie Railway Company was also a party in interest to the said proceeding before the Interstate Commerce Commission as is also averred in paragraph 9 of the complaint, and as fully shown by the said order and report of the Commission dated July 11, 1938; that subsequent to the said proceeding before the Interstate Commerce Commission by order of the District Court of the United States for the District of Minnesota, Fourth Division, entered on January 29, 1938, in a proceeding for the reorganization of the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, pursuant to the provisions of Section 77 of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supple-
[fols. 105-106] mentary thereto, G. W. Webster and Joseph Chapman, applicants for intervention herein, were duly appointed Trustees of all properties of the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

3. That under Sections 212 and 213 of the Judicial Code, as amended by the Act of October 22, 1913 (Chap. 32, 38 Statutes 220, U. S. C. A., Title 28, Section 45a), said applicants for intervention, as such parties in interest to the said proceeding before the Interstate Commerce Commission, have an unconditional right to intervene in and appear as parties to this cause, which involves the validity of the said order of the Interstate Commerce Commission entered in the said proceeding, and the interest of each of the said applicants.

Wherefore, said applicants respectfully pray for the entry of an order granting them leave to intervene herein and to be made parties defendant hereto and to file instanter their separate answer to the complaint heretofore filed herein.

Signed: Kenneth F. Burgess, C. F. Martin, Douglas F. Smith, Attorneys for said Applicants for Intervention. Address: 11 S. LaSalle St., Chicago, Ill. Sidley, McPherson, Austin & Burgess, of Counsel.

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—September 26, 1938

This cause coming on to be heard on the motion of Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, for leave to intervene in and to be made parties to the above entitled cause and to file their separate answer to the complaint heretofore filed in said cause, the court, upon consideration thereof, being fully advised in the premises, finds that said motion should be granted.

It Is Therefore Ordered, Adjudged and Decreed that the said applicants for intervention be and they are hereby given leave to intervene in and they are hereby made parties to the above entitled cause.

[fols. 108-109] It Is Further Ordered that said applicants for intervention may file instanter their separate answer to the bill of complaint heretofore filed herein in the same manner and with like effect as if named in the original bill as parties hereto.

Enter:

Evan A. Evans, United States Circuit Court Judge. Charles E. Woodward, United States District Court Judge. Philip L. Sullivan, United States District Court Judge.

Dated: Sept. 26, 1938.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENERS' ANSWER—Filed September 22, 1938

Now come Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North

Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, intervening defendants, hereinafter referred to as the interveners, and for their separate answer to plaintiff's complaint herein allege and say:

I

Answering paragraph 1 of the complaint, interveners admit for purposes of this suit that the allegations contained therein are true.

Further answering paragraph 1 of the complaint, interveners allege that, while plaintiff is engaged in the business of conducting and operating a public stockyard in the City [fol. 111] of Chicago known as Union Stock Yards, as alleged in said paragraph 1 of the complaint, said plaintiff is also engaged in conducting transportation by railroad as a common carrier and is subject as such to the Interstate Commerce Act.

II

Answering paragraph 2 of the complaint, interveners admit for purposes of this suit that the allegations contained therein are true; except that interveners deny that the facilities maintained and operated by plaintiff which are "used and useful in the operation of said stockyards" include "platforms, chutes and pens which are used for unloading livestock from railroad cars and motor vehicles following the inbound movement of such livestock and for loading livestock into railroad cars and motor vehicles for outbound movement", as alleged in said paragraph 2 of the complaint; but interveners allege that the said facilities of the plaintiff "including platforms, chutes and pens" for loading and unloading livestock are in fact used and useful in the operation of plaintiff's business as a common carrier by railroad subject to the Interstate Commerce Act.

III

Answering paragraph 3 of the complaint, interveners admit for purposes of this suit that the allegations contained

therein are true; except as follows: Interveners deny that plaintiff loads and unloads livestock "for" said trunk line railroads, as alleged by plaintiff in paragraph 3 of the complaint. Interveners deny that "plaintiff does not furnish * * * any motive power for, nor in any way carry, the livestock which it unloads or loads * * *", as alleged in said paragraph 3 of the complaint; but interveners allege that, with respect to inbound traffic, plaintiff removes from the railroad cars the said livestock which it unloads and places the said livestock in suitable pens, and, with respect to outbound traffic, places the said livestock which it loads in the [fol. 112] railroad cars; that, in rendering the said services, plaintiff utilizes such means as are necessary to the satisfactory performance thereof, and that the same constitutes transportation by railroad as provided by the Interstate Commerce Act.

IV

Answering paragraph 4 of the complaint, interveners admit for purposes of this suit that the allegations contained in the first two sub-paragraphs thereof, appearing on page 5 of the said complaint, are true.

Answering the third sub-paragraph of paragraph 4 of the complaint, interveners deny that plaintiff has performed the services of loading and unloading livestock as "agent for the trunk line railroads", as alleged by plaintiff in said third sub-paragraph of paragraph 4 of the complaint.

Further answering the third sub-paragraph of paragraph 4 of the complaint, interveners allege that by the terms of Section 15(5) of the Interstate Commerce Act, transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards includes all necessary service of loading and unloading en route without extra charge therefor to the shipper, consignee or owner; that pursuant to the said Section 15(5) of the said Interstate Commerce Act, the compensation received by the plaintiff for the performance of the transportation service of loading and unloading the livestock should be included in the through transportation rate assessed against such shipments of livestock; that plaintiff collects the said transportation rate from the shipper, consignee or owner on behalf of all carriers participating in the said transportation, and that plaintiff receives from said transportation rate its compensation for the performance of the transportation service of loading and unloading the livestock.

[fol. 113]

V

Answering paragraph 5 of the complaint, interveners admit for the purposes of this suit that the allegations contained therein are true; except that interveners deny the conclusions therein stated as to the effect of the holding of the Supreme Court of the United States in the case of United States v. Union Stock Yards, 226 U. S. 286; but interveners allege that under the said decision and the decree of the Supreme Court entered therein, the plaintiff is required to maintain on file with the Interstate Commerce Commission its tariffs covering its loading and unloading service and is enjoined thereby from withdrawing and canceling its said tariffs, as it seeks to do by supplements to its said tariffs filed with the Commission, copies of which are made a part of the complaint as Exhibits "B" and "C" thereof.

Further answering paragraph 5 of the complaint, interveners admit that at and prior to the date of the said decision of the Supreme Court of the United States, plaintiff and Chicago Junction Railway Company were controlled by a New Jersey holding company, as alleged in said paragraph 5 of the complaint, and interveners further allege that they are informed and believe that at all times since said decision and up to and including the present time, plaintiff and the said Chicago Junction Railway Company were and are controlled by the said New Jersey holding company.

VI

Answering paragraph 6 of the complaint, interveners deny that "on, to-wit, December 1, 1913, plaintiff granted, demised and leased all the railroad properties and equipment owned by it * * *", as alleged in the said paragraph 6 of the complaint; and interveners allege that plaintiff retained the railroad facilities for loading and unloading livestock owned by it.

VII

Answering paragraph 7 of the complaint, interveners [fol. 114] deny each and every allegation therein contained; except that interveners admit that the properties of the plaintiff granted, demised and leased by it to said Chicago Junction Railway Company did not include plaintiff's platform, chutes and pens used in the loading and unloading

of carload shipments of livestock, as alleged in said paragraph 7 of the complaint.

Further answering paragraph 7 of the complaint, interveners allege that the status of the plaintiff as a common carrier subject to the Interstate Commerce Act, as theretofore determined by the Interstate Commerce Commission and by the Supreme Court of the United States, has not been changed or in any manner affected by the decision of the Interstate Commerce Commission in the proceeding known as Chicago Junction Case, referred to in said paragraph 7 of the complaint, or by any of the acts or transactions of the plaintiff, or any of the parties to the said proceeding before the Commission, or by any of the facts and circumstances involved or referred to therein.

VIII

Answering paragraph 8 of the complaint, interveners deny the matters, things and conclusions alleged therein.

Further answering paragraph 8 of the complaint, interveners allege that plaintiff, in the performance of its service of loading and unloading livestock, is a common carrier subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission, as has been previously determined on numerous occasions by both the Interstate Commerce Commission and the Supreme Court of the United States.

Further answering paragraph 8 of the complaint, interveners allege that unless plaintiff is a common carrier by railroad and as such subject to the provisions of the Interstate Commerce Act, Section 15(5) of the said Act, takes from and deprives the interveners of their property without due process of law and without just compensation, in violation of and contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

[fol. 115] IX

Answering paragraph 9 of the complaint, interveners admit for purposes of this suit that the allegations contained therein are true; except that interveners deny that the charges stated in plaintiff's rate tariff, I. C. C. No. 12, on file with the Commission, are for loading and unloading livestock "as agent for the railroads", as asserted in said tariff and alleged in said paragraph 9 of the complaint.

X

Answering paragraph 10 of the complaint, interveners admit and allege that at the hearings before the Commission in this proceeding, plaintiff sought to introduce evidence pertaining to hundreds of public stockyards other than plaintiff's stockyard, lighterage and dock companies, agencies handling cotton and operators of trucks, not parties to the proceeding; and that the Chairman of the Commission and the examiner refused to admit such evidence; but interveners deny that plaintiff was not given full opportunity to make its offer of said evidence, to identify and describe the said evidence, and to qualify the witnesses who were presented to introduce said evidence; and interveners further deny that the conduct of the said examiner or of the Commission or any one of the commissioners in connection with the admission of the said evidence or otherwise was arbitrary, unreasonable or contrary to law.

Further answering paragraph 10 of the complaint, interveners admit that on or about September 8, 1937, plaintiff filed with the Commission a petition for further hearing before final submission, which said petition was denied.

Further answering paragraph 10, interveners deny each and every allegation therein contained, except those hereinbefore expressly admitted.

[fol. 116] XI

Answering paragraph 11 of the complaint, interveners admit that the Interstate Commerce Commission made and entered the reports and order referred to therein, including the report of July 11, 1938.

Interveners further allege that the issue considered by the Interstate Commerce Commission in its said report and order dated July 11, 1938, is identical with the issue previously passed upon and determined by the Commission, after a full and complete hearing, in its findings, report and order dated December 11, 1935, made in a proceeding entitled "Investigation and Suspension Docket No. 4109, Livestock Loaded and Unloaded at Chicago", reported in 213 I. C. C. Reports at page 330, which proceeding was instituted by the Commission on its own motion for the purpose of determining whether certain schedules filed by the plaintiff with the Commission, in which plaintiff undertook to cancel its tariffs setting forth its charges for loading and unloading live-

stock at the Union Stockyards, Chicago, Illinois, were in violation of the Interstate Commerce Act, and which said findings, report and order of December 11, 1935, have by reference been incorporated in and made a part of the said report of the Commission dated July 11, 1938, a copy of which report of December 11, 1935, is included in the complaint as a part of Exhibit "F" thereof; interveners allege that the plaintiff is required by said findings, report and order of the Interstate Commerce Commission of December 11, 1935, to maintain on file with the Commission its tariffs covering its loading and unloading service; and interveners respectfully refer the court to the text of the said report of December 11, 1935, and the said report and order of July [fol. 117] 11, 1938, for more full and complete information in the premises.

XII

Answering paragraph 12 of the complaint, interveners admit for purposes of this suit that the allegations contained therein are true; but for a full and complete statement of the facts and conclusions stated and found by the Interstate Commerce Commission in its report and orders mentioned in said paragraph 12 of the complaint, the court is respectfully referred to the full text of said report and orders which are annexed to the complaint and made a part thereof as Exhibits "F" and "H".

XIII

Answering paragraph 13 of the complaint, interveners admit for purposes of this suit that the allegations contained therein are true; except that interveners deny that plaintiff "is not a common carrier by railroad or otherwise, and is not a common carrier subject to the provisions of the Interstate Commerce Act or the jurisdiction of the Commission", as alleged by plaintiff in the said paragraph 13 of the complaint.

XIV

Answering paragraph 14 of the complaint, interveners deny the matters and things and conclusions alleged therein; and interveners deny that the said order of the Interstate Commerce Commission, or any other order of the said Commission herein complained of, are or is unlawful, invalid

or null and void for the reasons therein alleged or for any other reasons.

Further answering paragraph 14 of the complaint, interveners allege that, in the proceeding wherein the order here attacked was entered, a full hearing, as provided for in and [fol. 118] by the Interstate Commerce Act, was granted to all parties to the said proceeding, including the plaintiff herein; that much evidence, both oral and documentary, bearing on the matters covered in and by the report and order of the Commission was submitted to the Commission; that in briefs filed in said proceeding all questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of all parties, including the plaintiff herein, by their respective counsel; that by its report and order the Commission determined the matter presented to it in said proceeding; that the question thus determined by the Commission is a mixed question of law and fact and that the Commission, after a full hearing as provided by the Interstate Commerce Act, has determined that question against the plaintiff; and that the findings and conclusions of the Commission as set forth in its reports and orders filed with the complaint herein, and each of them, was and is fully supported and justified by the evidence submitted in this proceeding; and that in making said order the Commission did not exceed the authority conferred upon it and that none of its findings or orders were made either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it; and that said orders were made in the exercise of the authority vested in the Commission by the Interstate Commerce Act after a full and lawful hearing and in the light of all the evidence presented.

XV

Answering paragraph 15 of the complaint, interveners deny that, if said order of July 11, 1938, is permitted to become effective, plaintiff will suffer irreparable damage for the reasons or for any of the reasons set forth in said paragraph 15 of the complaint, or for any other reasons.

[fols. 119-131] XVI

Answering paragraph 16 of the complaint, interveners deny the allegation contained therein.

Except as herein expressly admitted, interveners deny the truth of each of and all the allegations contained in the complaint insofar as they conflict either with the allegations herein or with either the statements or conclusions of fact included in said report and order of December 11, 1935, and said report and order of July 11, 1938, which reports and orders are hereby referred to and made a part hereof.

Wherefore, having fully answered the complaint, interveners pray that the relief therein prayed be denied and the complaint be dismissed with costs to the plaintiff, and that interveners have the benefit of such other and further orders, decrees or relief as may be just and proper.

(Signed) Kenneth F. Burgess, C. F. Martin, Douglas F. Smith, Attorneys for said Interveners. Address: 11 S. LaSalle St., Chicago, Ill. Sidley, McPherson, Austin & Burgess, of Counsel.

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO INTERVENE AS A PARTY DEFENDANT—Filed Feb. 20, 1939

Now comes the National Live Stock Marketing Association, and moves the court for leave to intervene in this action in order to assert the defenses set forth in their answer, which accompanies this motion and is made a part hereof, and of which a copy is hereto attached, and in support of said motion show as follows:

1. That the complaint in the above entitled cause involves the validity of a certain order of the Interstate Commerce Commission entered by the said Commission on July 11, 1938, in its Investigation and Suspension Docket 4296, "Cancellation of Live Stock Services at Chicago," in that the said complaint seeks to enjoin, set aside, annul and suspend the said order entered pursuant to the report of said Commission issued at the same time, which order and report are annexed to and made a part of the complaint, as Exhibit "F" thereof, and which order and report are hereby made a part of this motion by reference.

2. That your petitioner, the National Live Stock Marketing Association, is a corporation not for profit, composed of about 300,000 livestock producers and feeders and affiliated live stock marketing associations engaged in the receiving, [fols. 133-134] shipping and handling of live stock at practically all the primary markets of the country, including the Union Stock Yards at Chicago, Illinois, and that the applicant for intervention herein was a party to the said proceedings before the Interstate Commerce Commission.

3. That under Sections 212 and 213 of the Judicial Code, as amended by the Act of October 22, 1913 (Chap. 32, 38 Statutes 220, U. S. C. A., Title 28, Section 45a), said applicant for intervention, as such party in interest to the said proceeding before the Interstate Commerce Commission, has an unconditional right to intervene in and appear as a party to this cause, which involves the validity of the said order of the Interstate Commerce Commission entered in the said proceeding, and the interest of the said applicant.

Wherefore, said applicant respectfully prays for the entry of an order granting them leave to intervene herein and to be made a party defendant hereto and to file instanter their separate answer to the complaint heretofore filed herein.

(Signed) Lee J. Quasey, Attorney for said Applicant for Intervention. 160 No. La Salle St., Chicago, Illinois.

[fols. 135-136] In United States District Court

[Title omitted]

Order Allowing Petition of Intervention of National Live Stock Marketing Association—Feb. 20, 1939

This cause coming on to be heard on application duly made in court for leave to National Live Stock Marketing Association to intervene in the above entitled proceeding, the court, upon consideration thereof, being fully advised in the premises, finds that said application should be granted.

It is Ordered that the said applicant for intervention be and it is hereby given leave to intervene in and that it is hereby made a party to the above entitled cause.

It is Further Ordered that said applicant for intervention may file instanter their separate answer to the bill of complaint heretofore filed herein in the same manner and with like effect as if named in the original bill as a party hereto.

Enter:

Evan A. Evans, United States Circuit Court Judge; Charles E. Woodward, United States District Court Judge; M. L. Igoe, United States District Court Judge.

Dated: February 20th, 1939.

[fol. 137] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENER'S ANSWER—Filed February 20, 1939

Now comes the National Live Stock Marketing Association, intervening defendant, hereinafter referred to as the intervener, and for its separate answer to plaintiff's complaint herein alleges and says:

I

Answering paragraph 1 of the complaint, intervener admits for purposes of this suit that the allegations contained therein are correct.

The intervener further alleges that while plaintiff is engaged in the business of conducting and operating a public stockyard in the City of Chicago, known as Union Stock Yards, as alleged in said paragraph 1 of the complaint, said plaintiff is also engaged in conducting transportation by railroad as a common carrier and is subject as such to the Interstate Commerce Act.

II

Answering paragraph 2 of the complaint, intervener admits for purposes of this suit that the allegations contained therein are true, except that intervener denies that the [fol. 138] facilities maintained and operated by the plaintiff which are used and useful in the operation of the said stock yards.

Answering further, intervener alleges that the facilities of the plaintiff, "including platforms, chutes and pens" for unloading and loading live stock are in fact used and useful in the operation of plaintiff's business as a common carrier by railroad subject to the Interstate Commerce Act.

III

Answering paragraph 3 of the complaint, intervener admits for purposes of this suit that the allegations contained therein are true, except that intervener denies that plaintiff loads and unloads live stock for said trunk line railroads. That "the plaintiff does not furnish • • • any motive power for, nor in any way carry, the live stock which it unloads or loads."

Answering further, intervener alleges that with respect to services rendered by the plaintiff in unloading live stock from rail cars and loading live stock into rail cars the plaintiff utilizes such means as are necessary to the proper performance thereof, and that such services constitute transportation by railroad in accordance with the provisions of the Interstate Commerce Act.

IV

Answering paragraph 4 of the complaint, intervener admits for purposes of this suit that the allegations contained are true, except intervener denies that plaintiff has performed the said services as agent for the trunk line railroads, and answering further, intervener alleges that services rendered by the plaintiff in connection with the unload-[fol. 139] ing and loading of live stock are necessary services in accordance with the provisions of Section 15(5) of the Interstate Commerce Act; that compensation received by the plaintiff for the performance of the services required and necessary as a part of transportation of an interstate shipment of live stock destined to or received at public stock yards should be included in the through transportation rate under the contract of transportation; that plaintiff collects the transportation charges from the shipper, consignee or owner on behalf of all carriers participating in the said transportation, and that plaintiff receives from said transportation rate its compensation for the performance of the transportation service of loading and unloading such live stock shipments.

V

Answering paragraph 5 of the complaint, intervener admits for the purposes of this suit that the allegations contained therein are true, except that intervener alleges that under the decision of the Supreme Court of the United States decree entered therein in the United States vs. Union Stock Yards, 226 U. S. 286, (1912) plaintiff is required to maintain on file with the Interstate Commerce Commission its tariffs covering its unloading and loading services and is thereby enjoined from withdrawing and cancelling its said tariffs, as it now seeks to do.

Answering further, intervener alleges that it is informed and believes that at all times since the decision next above mentioned and up to the present time, the plaintiff and the said Chicago Junction Railway Company were and are controlled by the said New Jersey holding company.

[fol. 140]

VI

Answering paragraph 6 of the complaint, intervener denies the allegations contained therein and alleges that the plaintiff retains at the present time the railroad facilities for the unloading and loading of live stock shipments by rail received at or consigned to the Union Stock Yards at Chicago.

VII

Answering paragraph 7 of the complaint, intervener denies the allegations contained therein, except that it admits that the properties of the plaintiff granted, demised and leased by it to the Chicago Junction Railway Company did not include plaintiff's platforms, chutes and pens used in the loading and unloading of carload shipments of live stock.

Answering further, intervener alleges that the status of the plaintiff as a common carrier subject to the Interstate Commerce Act as heretofore determined by the Interstate Commerce Commission and by the Supreme Court of the United States, has not been changed or affected by the decision of the Interstate Commerce Commission in the Chicago Junction Case, 71 I. C. C. 631 (1922), or by any of the acts or transactions of the plaintiff, or any of the parties to the said proceeding before the Commission, or by any

of the facts and circumstances involved or referred to therein.

VIII

Answering paragraph 8 of the complaint, intervener denies the allegations therein.

Answering further, intervener alleges that the plaintiff in the performance of its services in the unloading and [fol. 141] loading of live stock at the Union Stock Yards at Chicago is a common carrier subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission as has been consistently held and determined by both the Interstate Commerce Commission and the Supreme Court of the United States on a number of occasions since the original decision by the United States Supreme Court in 1912 reported in 226 U. S. 286, in which the plaintiff was held to be a common carrier subject to the Interstate Commerce Act.

IX

Answering paragraph 9 of the complaint, intervener admits the allegations contained therein.

X

Answering paragraph 10 of the complaint, intervener admits the allegations contained therein, but intervener denies that plaintiff was not given full opportunity to make its offer of evidence pertaining to shipments of live stock by railroad to and from points in the United States other than Chicago, and intervener further denies that the conduct of the said examiner or of the Commission in connection with the admission of said evidence, was arbitrary, unreasonable or contrary to law.

XI

Answering paragraph 11 of the complaint, intervener admits that the Interstate Commerce Commission made and entered the reports and orders referred to therein, including the report of July 11, 1938.

Answering further, intervener alleges that the issue considered in the report and order next above mentioned is [fol. 142] identical to the issue in Investigation and Sus-

pension Docket 4109, Live Stock Loading and Unloading At Chicago, 213 I. C. C. 330, dated December 11, 1935, which decision and order the Commission made a part of the said July 11, 1938 order by reference.

Answering further, intervener alleges that in the said December 11, 1935 order the plaintiff is required to maintain on file with the Commission its tariffs naming loading and unloading charges on live stock at the Union Stock Yards at Chicago, and intervener respectfully refers the honorable court to Exhibit "F" on page 31 of the complaint for more complete information in the premises.

XII

Answering paragraph 12 of the complaint, intervener admits that the allegations contained therein are true, but the court is respectfully referred to Exhibits "F" and "H", beginning on pages 31 and 72 respectively of the complaint.

XIII

Answering paragraph 13 of the complaint, intervener admits that the allegations contained therein are true, except that intervener denies that plaintiff is not a common carrier by railroad or otherwise, and is not a common carrier subject to the provisions of the Interstate Commerce Act (as amended) or the jurisdiction of the Interstate Commerce Commission.

XIV

Answering paragraph 14 of the complaint, intervener denies the matters and conclusions alleged therein, and intervener further denies that the said order of the Inter- [fol. 143] state Commerce Commission, or any other order of said Commission herein complained of, are or is unlawful, invalid or null and void for the reasons therein alleged or for any other reasons.

Answering further, intervener alleges that the proceeding wherein the order here attacked was entered that all parties, including the plaintiff herein, were accorded a full hearing in accordance with the provisions of the Interstate Commerce Act.

Answering further, intervener alleges that the findings and conclusions of the Commission as set forth in its reports and orders filed with the complaint herein, and each of them, was and is fully supported and justified by the evidence submitted in said proceedings.

Answering further, intervener alleges that the Commission did not exceed the authority conferred upon it under the Interstate Commerce Act and that none of its findings or orders were made either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it.

XV

Answering paragraph 15 of the complaint, intervener denies that if the said order of July 11, 1938 is permitted to become effective, plaintiff will suffer irreparable damage for the reason or for any reasons set forth in said paragraph.

XVI

Answering paragraph 16 of the complaint, intervener denies the allegation set forth therein.

Except as herein expressly admitted, the intervener denies the truth of each and all the allegations contained [fols. 144-145] in the bill of complaint, insofar as they conflict either with the allegations herein, or with the statements, or conclusions of fact included in said report and order of July 11, 1938.

Wherefore, having fully answered the complaint, intervener prays that the said complaint be dismissed and that the intervener have the benefit of such other and further orders, decrees or relief as the honorable court may deem just and proper in the premises.

National Live Stock Marketing Association, by Lee J. Quasey, Commerce Counsel.

160 No. La Salle St., Chicago, Illinois.

[fol. 146] In United States District Court

[Title omitted]

Plaintiff's Comments Respecting and Suggested Modifications of Defendants' Proposed Findings of Fact—Filed March 2, 1939

Defendants' Finding No. 1

1. That plaintiff, The Union Stock Yard and Transit Company of Chicago, is a corporation which was organized

in 1865 under a special charter from the State of Illinois, and that in said charter it was granted the power to build, own and operate a railroad and a stockyard, and for its purposes as a railroad, to exercise the power of eminent domain.

Comment: In this proposed finding undue emphasis is placed upon the charter power of plaintiff to own and operate a railroad. An examination of the charter indicates that the principal function of the corporation was to be [fol. 147] that of operating a general union stockyard, and that the operation of a railroad and of a hotel were to be incidental thereto. (Ex. 2.)*

Plaintiff's Suggested Finding: Plaintiff, The Union Stock Yard and Transit Company of Chicago, was incorporated in the year 1865 by a special act of the Legislature of the State of Illinois. It was authorized by said act to construct and operate a general union stockyard for live-stock, to construct and operate a hotel for the accommodation of the public doing business at the yards, to construct a railway to connect its stockyard with the tracks of railroads terminating in Chicago, and to operate said railway. By said act plaintiff was given the power to take land "for the purpose of constructing said railroad track (but for no other purpose) * * * in the manner provided for in the 'Act to amend the law condemning the right of way for purposes of internal improvement,' approved June 22, A. D. 1852, and the acts amendatory thereof, * * *." Said act also provides that for the care, subsistence and handling of livestock plaintiff "may take and require to be paid, such reasonable charges as may be deemed just and proper." (Tr. 6; Ex. 2.)

Defendants' Finding No. 2

2. That at said time, as authorized in its charter, plaintiff acquired real estate and constructed a stockyard within the present limits of the City of Chicago known as the Union Stock Yards; that at all times since, and now, same

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* The record before the Commission was introduced in evidence as plaintiff's Exhibit A. References herein to transcript and exhibits are to pages of the transcript and exhibits as numbered by the Commission unless otherwise stated.

has been and is operated as a public stockyards, and since [fol. 148] 1921 has been so designated pursuant to law; plaintiff also constructed approximately 300 miles of railroad tracks consisting of main lines connecting with railroad trunk lines entering Chicago, and switches to various industries located adjacent to its tracks.

Comment: This proposed finding is substantially correct, except that the stockyard at the time of its original construction was not located within the City of Chicago. (Tr. 6; Ex. 2.) Undue emphasis, however, is laid upon the extent of the trackage which plaintiff constructed.

Plaintiff's Suggested Finding: Upon receiving its charter plaintiff acquired approximately half a section of land in what is now a part of the City of Chicago, Illinois, and constructed thereon a large stockyard known as Union Stock Yards, which was opened for business on Christmas Day, 1865, and has since that time been operated by plaintiff as a public stockyard, and since 1921 has been duly designated as a stockyard subject to the provisions of the Packers and Stockyards Act, 1921 (7 U. S. Code, secs. 201-229). Pursuant to the requirements of said act plaintiff, since December 30, 1921, has had on file, and still has on file, with the Secretary of Agriculture schedules stating its rates and charges for various stockyard services as defined in Section 301 of said act (7 U. S. Code sec. 201) furnished by plaintiff at its said stockyard, except the services of loading and unloading livestock for railroads. In addition to constructing a stockyard plaintiff also constructed a hotel for the accommodation of its patrons, and approximately 300 miles of railroad tracks, consisting of main lines connecting with railroad trunk lines entering Chicago and switches to various industries located adjacent to its tracks. (Tr. 6-8, 26, 29, 231; Exs. 1 and 8.)

[fol. 149] Defendants' Finding No. 3

3. That at all times since the construction of the Union Stock Yards, and now, plaintiff has owned, maintained and exclusively operated, loading and unloading platforms, chutes and pens, whereby livestock transported by railroad in interstate commerce and consigned from or to the Union Stock Yards, is loaded into or unloaded from railroad cars in which it is transported.

Comment: No livestock is consigned to or shipped by plaintiff. (Tr. 182.) A slight modification in the proposed finding has been made to avoid any inference to the contrary. A great deal of intrastate business is also shipped to and from plaintiff's yard. (See sec. 3 of bill of complaint and answers thereto.)

Plaintiff's Suggested Finding: At all times since the construction of the Union Stock Yards, and now, plaintiff has owned, maintained and exclusively operated loading and unloading platforms, chutes and pens whereby livestock transported by railroad in interstate and Illinois intrastate commerce and consigned by or to persons at the Union Stock Yards is loaded into or unloaded from railroad cars in which it is transported.

Defendants' Finding No. 4

4. That at all times since the construction of the Union Stock Yards by plaintiff, plaintiff with its own employees performed, and does now perform, the service of unloading livestock from railroad cars into its unloading pens and the service of loading livestock from its loading pens into railroad cars; as provided in plaintiff's rules and regulations [fol. 150] such services of loading and unloading are not permitted to be performed by any persons not employed by the plaintiff; said unloading and loading facilities and the operation thereof by plaintiff constitutes the only means of ingress to and egress from the said public stockyards for livestock transported to and from said yards by railroad.

Comment: A more accurate and complete statement with respect to the performance of the services of loading and unloading livestock by plaintiff is set forth in plaintiff's suggested finding. The fact that plaintiff insists upon performing these services is legally immaterial under the issues in this case. If, however, it is felt that some such finding should be made, the reasons why plaintiff insists upon performing the services should also be set out as in plaintiff's suggested finding.

Plaintiff's Suggested Finding: Since shortly after plaintiff started business in 1865 it has performed, and still performs, for the trunk-line railroads the said services of loading and unloading carload shipments of livestock consigned by rail from and to its said stockyard, and (ex-

cept for a short period when a portion thereof was paid by shippers) its charges for said services have been paid to it, and are now paid to it, by the trunk-line railroads transporting such shipments to and from said stockyard. Shipments of livestock consigned from and to consignors and consignees at said stockyard by rail must be loaded and unloaded by means of plaintiff's platforms, chutes and pens. Plaintiff does not furnish any vehicle or any motive power for, nor in any way carry, the livestock which it unloads or loads for said railroads, but drives such livestock from the railroad cars into suitable pens owned by [fol. 151] plaintiff or from pens owned by plaintiff into the railroad cars. Under plaintiff's rules the said services of loading and unloading are not permitted to be performed by any persons not employed by the plaintiff. Plaintiff insists upon performing these services (a) because they are inherently stockyard services and are performed on the premises of plaintiff; (b) because the work of loading and unloading requires men long trained in the handling of all kinds of livestock, and plaintiff has and the railroads do not have such personnel; (c) because shipments of livestock, which is a perishable commodity, must be unloaded immediately in order to prevent congestion and delay, and the railroads as a practical matter could not perform the service efficiently; (d) because plaintiff could not properly serve its non-railroad patrons if it permitted the railroads to perform the loading and unloading; (e) because divided responsibility would result in an interference with the even and efficient flow of traffic essential to the successful operation of a livestock market; and (f) because of other practical objections, such as wage scales and working conditions, which would make it inadvisable for plaintiff to permit the railroads to do the work on its property. (Tr. 39-41, 49, 101-105; Ex. 1.)

Defendants' Findings Nos. 5 and 6

5. That following the decision of the Supreme Court of the United States in the case entitled United States v. Union Stock Yard and Transit Company, 226 U. S. 286, decided December 9, 1912, and pursuant thereto, plaintiff has filed its tariffs with the Interstate Commerce Commission wherein it has named its charges for loading and unloading livestock (and certain incidental services) at the

Union Stock Yards, being transported by railroad in interstate commerce from and to said yards.

[fol. 152] 6. That at all times thereafter, except for a period of several months in 1919 when they were unlawfully withdrawn by plaintiff (Livestock Loading and Unloading Charges, 52 I. C. C. 209), the plaintiff has maintained, and does now maintain, its tariffs on file with the Interstate Commerce Commission wherein such charges are set forth pursuant to the provisions of the Interstate Commerce Act and the tariff regulations of the Interstate Commerce Commission, and that the plaintiff from time to time has increased the amount of said charges for its services in the loading and unloading of livestock transported by railroad in interstate commerce to and from the Union Stock Yards.

Comment: There is no evidence of record that the charges published by plaintiff in its loading and unloading tariff now cover any incidental services. The record affirmatively shows that charges for incidental services performed for the railroads are published in plaintiff's tariffs on file with the Secretary of Agriculture. (Ex. 8.) The fact that plaintiff has from time to time increased the amount of its charges for loading and unloading services is wholly immaterial to the issues in this case. The tariffs which plaintiff has filed with the Commission show on their face that the services are performed as a carrier's agent. (Ex. A to bill of complaint; Ex. 7.)

Plaintiff's Suggested Finding: Prior to 1913 plaintiff did not publish its charges for the services of loading and unloading livestock with any regulatory body. On December 9, 1912, the case of United States v. Union Stock Yard, 226 U. S. 286, was decided. At and prior to the date of said decision substantially all the stock of plaintiff and the Chicago Junction Railway Company was held by a New [fol. 153] Jersey holding corporation; said Chicago Junction Railway Company was engaged in operating a railroad; and plaintiff received a share of the profits of said Chicago Junction Railway Company. Shortly after said decision plaintiff filed with the Interstate Commerce Commission a tariff stating its charges for loading and unloading carload shipments of livestock consigned by rail from and to its said stockyard, which tariff became effective on May 20,

1913; and since said date (except for a short period in 1919) plaintiff has kept such tariffs on file with said Commission. Plaintiff's tariffs recite that the services of loading and unloading are performed "as a carrier's agent." (Tr. 7-13, 108; Ex. 7 and Ex. A to bill of complaint.)

Defendants' Finding No. 7

7. That the loading and unloading of livestock at plaintiff's Union Stock Yards in the City of Chicago, and the furnishing of facilities therefor, is an inseparable and an indispensable part of the interstate transportation by railroad of livestock to and from said yards.

Comment: The statement that unloading and loading livestock at plaintiff's yards are an inseparable part of interstate railroad transportation is only a partial truth. No one can dispute the fact that since Section 15(5) of the Interstate Commerce Act was enacted such services are a part of the interstate rail transportation in the sense that the trunk-line railroads are required to perform or secure their performance, but this does not mean that the railroads cannot hire others to do the work and furnish the facilities for them. In fact, stockyard loading and unloading services (quite apart from the legal aspects thereof) are inherently stockyard services, and as a practical matter [fol. 154] the railroads at public stockyards must hire the stockyard company to perform these services. The finding is a pure conclusion of law and has no place in findings of fact. If it is thought otherwise, the finding suggested by plaintiff should be made.

Plaintiff's Suggested Finding: Loading and unloading of livestock at plaintiff's Union Stock Yards in the City of Chicago and the furnishing of the facilities therefor are an inseparable and indispensable part of the interstate transportation by railroad of livestock to and from said yards in the sense that the trunk-line railroads under the law must furnish such services and facilities as a part of their obligation to the shipper. The services of loading and unloading livestock at plaintiff's stockyard (irrespective of the legal aspect thereof) are in their nature stockyard and not railroad services. The trunk-line railroads hire plaintiff to perform these services and to furnish the necessary facilities. (Tr. 39, 101-105; Ex. 1.)

Defendants' Finding No. 8

8. That plaintiff's unloading and loading facilities at the Union Stock Yards at Chicago, and the operation thereof by the plaintiff, constitute terminal facilities and services required by statute and necessary to the completing and commencing of interstate transportation of livestock by railroad to and from said Union Stock Yards; that plaintiff has at all times held itself out to furnish such terminal facilities and to perform such terminal services necessary to complete and to commerce the transportation of livestock by railroad to and from said Union Stock Yards.

Comment: The portion of this proposed finding to the semicolon is legally immaterial. It is a pure conclusion of law and is inaccurate and misleading. The remaining portion [fol. 155] of said proposed finding is immaterial and incomplete. If, however, it is felt that some such finding should be made, the following finding is suggested:

Plaintiff's Suggested Finding: Plaintiff's unloading and loading facilities at the Union Stock Yards in Chicago and the services of loading and unloading livestock are terminal facilities and services necessary to the completion and commencing of interstate transportation of livestock by railroad to and from said stockyard in the sense that the trunk-line railroads must, under the Interstate Commerce Act, furnish such facilities and services as a part of their obligation to the shipper. Plaintiff, as a part of its public calling of operating a stockyard, has at all times furnished such facilities and performed such services as agent for the trunk-line railroads. (Tr. 39, 41, 101-105; Ex. 7.)

Defendants' Finding No. 9

9. That in respect to livestock consigned to or from the Union Stock Yards at Chicago the railroad cars provided for its transportation have at all times and are now transported to and from plaintiff's loading and unloading platforms, chutes and pens by carriers by railroad known as the trunk-line carriers, among whom are the railroad company interveners herein, which said trunk-line carriers perform service by railroad in respect to said transportation of livestock pursuant to, and in accordance with, their tariffs on file with the Interstate Commerce Commission, other

than the services of receipt and loading and the unloading of said livestock and the delivery of the same into suitable pens.

[fol. 156] Comment: This proposed finding is not clear with respect to what provisions are made in the tariffs of the trunk-line carriers.

Plaintiff's Suggested Finding: The trunk-line railroads in their tariffs on file with the Interstate Commerce Commission and Illinois Commerce Commission provide that they will transport inbound carload shipments of livestock to pens in plaintiff's stockyard and transport outbound carload shipments of livestock from pens in plaintiff's stockyard, and in said tariffs the said trunk-line railroads also provide that they will pay plaintiff its charges for unloading inbound carload shipments of livestock from the railroad cars into suitable pens and its charges for loading out-bound carload shipments of livestock from said pens into the railroad cars. The term "suitable pens" is defined in said tariffs as meaning "the pen into or from which livestock is loaded, unloaded or reloaded directly from or to the car. Plaintiff is listed in said tariffs as an industry operating a stockyard, and its stockyard is shown in said tariffs as a station on the line of Chicago Junction Railway, which is a trade name used by The Chicago River and Indiana Railroad Company in operating the properties covered by the aforesaid lease of May 19, 1922. Plaintiff does not have, and is not a participating carrier in, any tariff on file with the Interstate Commerce Commission naming rates or charges for the transportation of persons or property from place to place. The only tariff which plaintiff has on file with the Interstate Commerce Commission is a tariff stating its charges for performing, as a carrier's agent, the services of loading and unloading livestock at its stockyard in the City of Chicago. Plaintiff has no tariffs on file with the Illinois Commerce Commission, the tribunal charged with the regulation of intrastate rates of common [fol. 157] carriers by railroad in the State of Illinois, and has never been required by said Commission to file tariffs of any kind or character. Inbound carloads of livestock consigned to consignees at said stockyard by rail are transported by the various trunk-line railroads serving the City of Chicago with their own engines and crews to the unloading platforms and chutes of plaintiff, where plaintiff un-

loads such livestock for said railroads from the railroad cars into suitable pens in said stockyard owned by plaintiff. Outbound carload consignments of livestock shipped by rail are loaded by plaintiff for said trunk-line railroads from its pens in said stockyard into railroad cars furnished and placed for loading by said railroads adjcent to plaintiff's platforms and chutes, and are thereafter transported from said platforms by the said railroads with their own engines and crews. The trains of said railroads do not come upon the property of plaintiff, and plaintiff exercises no control over them. (Tr. 25, 41; 116, 306, 352 et seq.; Exs. 1, 7 and 24.)

Defendants' Finding No. 10

10. That under and by virtue of said tariffs of the trunk-line carriers on file with the Interstate Commerce Commission, and pursuant to law, the charges of the plaintiff for its service in loading and unloading said livestock are included in, and made a part of, the through rates for the interstate transportation of said livestock between the Union Stock Yards and points of origin or destination, which through rates are assessed against the shipper, consignee or owner.

Comment: The unjustified inference which defendants would leave in this proposed finding is that plaintiff is a party to the through railrates on livestock. There is no [fol. 158] evidence to sustain this finding. On the contrary, the evidence shows that the trunk-line railroads publish rates which include the loading and unloading services at the Union Stock Yards, and make the contracts of carriage with the shipper. (Tr. 302, 305.) The trunk-line railroads employ plaintiff to perform the loading and unloading services for them and pay plaintiff's charges therefor. (Tr. 39, 41.) The charges which the railroads pay the plaintiff for such services are costs of transportation the same as the wages of the crews and the cost of fuel used in operating their locomotives, and may or may not find their way into the rates charged the shippers. As the Commission said in I. & S. 4109, the railroads must absorb the charge. (Bill of complaint p. 48.)

Defendants' Finding No. 11

11. That plaintiff is a common carrier engaged in the transportation of livestock by railroad in interstate com-

merce; that plaintiff owns and operates terminals and terminal facilities, including freight depots, yards and grounds used and necessary in the transportation and delivery of livestock transported by railroad in interstate commerce; that plaintiff has undertaken and held itself out publicly, and for hire, to perform, and does now perform, services rendered in the transportation of property and livestock and services in connection with the receipt, delivery and handling of property and livestock transported in interstate commerce by railroad; and that plaintiff has undertaken publicly, and for hire, to perform all necessary service of making delivery into suitable pens at the Union Stock Yards in Chicago of inbound shipments of ordinary livestock in carload lots moving by railroad in interstate commerce, [fol. 159] and the receipt and loading at said Union Stock Yards of shipments of ordinary livestock into railroad cars moving out of said yards in interstate commerce by railroad; that plaintiff engages in the transportation of livestock by railroad under such circumstances that its business is affected with a public interest and is a public business, and plaintiff performs the said transportation service as a common carrier and not as a private carrier.

Comment: The first clause is the ultimate question of law involved in this case. If a finding with respect to the status of plaintiff is included in what purports to be findings of fact, the finding should be that plaintiff is not a common carrier. The second clause is not sustained by the evidence and is inaccurate and misleading. The evidence shows that the only facilities which plaintiff furnishes in connection with the loading or unloading of rail-borne livestock are platforms, chutes and pens as defendants' proposed findings Nos. 3, 4, and 9 show. Plaintiff does not operate terminals, freight depots, freight yards or freight grounds, or furnish transportation in connection with the receipt, delivery or handling of either livestock or of dead freight as defendants' finding No. 11 indicates. The Union Stock Yards is the terminal of the railroads only in the sense that the trunk-line railroads afford transportation for livestock to and from said stockyard, and in the sense that most of the livestock shipped to Chicago by rail moves through said stockyard. We have already commented on the matters set forth in the third and fourth clauses. The fifth and last clause is not only a conclusion of law, but is an erroneous conclusion of law, except that the business of

operating a stockyard, including the loading and unloading of shipments moving by rail, is a public business, namely, a stockyard business. A more accurate statement of what [fol. 160] plaintiff does is shown in the suggested finding.

Plaintiff's Suggested Finding: Plaintiff owns, conducts and operates its said stockyard in the City of Chicago, and furnishes at said stockyard, services and facilities in connection with the receiving, buying, selling, marketing, feeding, watering, holding, delivery, shipment, weighing and handling of livestock transported by railroad trains and motor vehicles to and from said stockyard. Said stockyard is approximately one mile in length and one-half mile in width, and plaintiff maintains and operates therein numerous pens, driveways, buildings, scales and other facilities used and useful in the operation of said stockyard, including platforms, chutes and pens which are used for unloading livestock from railroad cars and motor vehicles following the inbound movement of such livestock and for loading livestock into railroad cars and motor vehicles for outbound movement. Livestock is transported to and from said stockyard by the trunk-line common carriers by railroad which serve said City of Chicago, and also by motor vehicles. (See sec. 2 of bill of complaint and answers thereto; also see Tr. 6, 8, 45-49, 569-606).

Defendants' Finding No. 12

12. That for many years prior to 1918, plaintiff's charge as published in its tariffs on file with the Interstate Commerce Commission for unloading livestock was 25 cents per car; that in 1918 it was increased to 50 cents per car; that in 1921 the Interstate Commerce Commission, in a proceeding entitled "Live Stock Loading and Unloading Charges," 61 I. C. C. 623, authorized a further increase to $1.00 per car; and that in 1923 plaintiff, by filing increased tariff [fol. 161] charges with the Interstate Commerce Commission, sought to increase the charge to $2.00 per car, whereupon the Interstate Commerce Commission, in a proceeding entitled "Live Stock Loading and Unloading Charges," 83 I. C. C. 248, found that such proposed increase was unreasonable and unjustified, and required the same to be cancelled. Thereafter plaintiff filed a supplement to its tariffs proposing to increase its charge for unloading livestock transported in interstate commerce to $1.25 per car, which

said increase was not protested, and thereafter became effective from and after December 14, 1934. Since that time plaintiff has unsuccessfully employed a number of devices in an effort to obtain a further substantial increase in its said charges without establishing the reasonableness thereof to the Interstate Commerce Commission, and it now seeks to eliminate itself from the jurisdiction of the Commission to enable it to make such further increase in its charges without justifying the reasonableness thereof before the Commission.

Comment: This finding is legally immaterial and should be entirely deleted. If it is decided, however, that a finding with respect to the quantum of plaintiff's charges is necessary, there should be added the finding suggested by plaintiff or a recitation of the substance of the testimony of witness Henkle at Transcript 108-112.

Plaintiff's Suggested Finding: Plaintiff has never voluntarily invoked the jurisdiction of the Interstate Commerce Commission, but has done so under legal and economic compulsion. (Tr. 112.)

Defendants' Finding No. 13

13. That by supplements to its tariffs filed with the Interstate Commerce Commission, to become effective on June [fol. 162] 19, 1935, plaintiff proposed to cancel all of its tariffs then on file with the Interstate Commerce Commission, which tariffs contained the charges assessed and collected by plaintiff for loading and unloading livestock transported in interstate commerce by railroad, and that said supplements bore the notation "No tariffs of this Company will hereafter be filed with the Interstate Commerce Commission;" that the operation of said supplements to said tariffs was suspended in a proceeding before the Interstate Commerce Commission entitled "Live Stock Loaded and Unloaded at Chicago, Investigation and Suspension Docket No. 4109;" that after full hearing the Interstate Commerce Commission issued its report therein dated December 11, 1935, 213 I. C. C. 330, wherein it found the plaintiff to be a common carrier by railroad, subject to the provisions of the Interstate Commerce Act in the performance of the service of loading and unloading livestock, and the delivery of the same into suitable pens at the Union Stock Yards, and that

as such the Interstate Commerce Commission ordered the plaintiff to continue to file its tariffs with the Interstate Commerce Commission defining its service and covering its charges for the loading and unloading of livestock at its public stockyards in the City of Chicago when transported in interstate commerce by railroad; and that by order the Interstate Commerce Commission required the plaintiff to cancel the supplements to its tariffs involved in that proceeding. That thereafter, and on January 14, 1936, the plaintiff filed with the Interstate Commerce Commission a petition for rehearing, reconsideration and re-argument of said proceeding, which petition the Interstate Commerce Commission, after consideration, denied.

Comment: This finding, which has to do with a previous proceeding, is immaterial and has no place in the findings [fol. 163] of fact in the present proceeding. The statement in the proposed finding to the effect that the Commission ordered plaintiff "to continue to file its tariffs" is erroneous. (See bill of complaint p. 33, where the Commission states it ordered plaintiff to cancel the suspended schedules.)

Defendants' Finding No. 14

14. That by tariffs filed, to become effective January 15, 1937, the plaintiff by supplements to its tariffs, which were identical except as to their effective date with the tariffs which had been filed to be made effective on June 19, 1935, and which the Interstate Commerce Commission had required to be cancelled, again proposed to cancel all of its tariffs then on file with the Interstate Commerce Commission, which said supplements likewise contained the notation, "No tariffs of this Company will hereafter be filed with the Interstate Commerce Commission;" that said tariffs so filed were suspended by the Interstate Commerce Commission until August 15, 1937, in a proceeding entitled "Cancellation of Live Stock Services at Chicago, Investigation and Suspension Docket No. 4296," and that said tariffs were subsequently voluntarily postponed by the plaintiff until January 1, 1940; that hearings were held in said proceeding at Washington, D. C. and at Chicago, Illinois, and that in opposition to the suspended supplements there appeared as protestants the railroad companies known as trunk-line carriers which are interveners herein, and which are en-

gaged in the transportation of livestock by railroad in interstate commerce to and from Chicago, and in opposition to the suspended schedules there appeared also representatives of National Live Stock Marketing Association, American National Live Stock Association, National Wool Growers' [fol. 164] Association, and Texas-Southwestern Cattle Raisers' Association which said organizations represent the producers, owners and shippers of livestock, and that after hearing the evidence and the arguments of the parties orally and on brief, the Interstate Commerce Commission on July 11, 1938, made its report and entered its order on July 11, 1938, which is herein sought by the plaintiff to be enjoined, set aside, annulled and suspended, wherein the Interstate Commerce Commission required the plaintiff to cancel its supplements to its tariffs by which it had undertaken to cancel all of its tariffs then on file with the Interstate Commerce Commission.

Comment: A more accurate statement of the facts with respect to the present proceeding before the Commission is made in the plaintiff's proposed finding.

Plaintiff's Suggested Finding: On or about December 15, 1936 plaintiff filed with the Interstate Commerce Commission supplement No. 5 to its rate tariff I. C. C. No. 12, to become effective on January 15, 1937. In and by said tariff supplement plaintiff undertook to cancel its only rate tariff, I. C. C. No. 12, then and now on file with the said Commission, and in which are stated its present charges for loading and unloading carload shipments of livestock, as carrier's agent, at its said stockyard in the City of Chicago. On or about December 15, 1936 plaintiff also filed with the said Commission supplement No. 5 to its tariff index I. C. C. No. 13, to become effective on January 15, 1937, whereby it undertook to cancel the tariff index that it had on file with the said Commission. Said supplement No. 5 to said rate tariff and said supplement No. 5 to said tariff index (which said supplements are hereinafter called "cancellation tariffs") were suspended by an order entered by said Com- [fol. 165] mission on January 11, 1937 upon a petition of seven of the twenty-two trunk-line railroads serving the City of Chicago, which petition complained of and protested against the proposed cancellation by plaintiff of its said rate tariff. In said order of January 11, 1937 said Commission ordered that the said Commission upon complaint, without

formal pleading, enter upon an investigation concerning the lawfulness of said cancellation tariffs, which said investigation is designated on the docket of said Commission as "Investigation and Suspension Docket No. 4296, Cancel-ation of Livestock Services at Chicago." Afterwards hearings were held in said proceeding by said Commission in the City of Washington, D. C. and in the City of Chicago, at which hearings plaintiff appeared and introduced certain evidence, and sought and attempted to introduce other evidence. The effective date of said cancellation tariffs has been voluntarily postponed by plaintiff to January 1, 1940. On July 11, 1938, the Commission made and entered its report and order in said proceeding, with one member of the Commission concurring in the result in a separate opinion and three members thereof dissenting in separate opinions. On or about August 12, 1938, the Commission issued its corrected report as of July 11, 1938. In and by said corrected report of July 11, 1938 the said Commission found that the plaintiff in the performance of the services of loading and unloading livestock at plaintiff's stockyard in Chicago, Illinois is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with the said Commission covering plaintiff's loading and unloading charges, and further found that the said cancellation tariffs were not justified; and in and by said order of July 11, 1938 the said Commission ordered plaintiff to cancel said cancellation tariffs on or before August 17, 1938 [fol. 166] upon notice to the said Commission and to the general public by not less than one day's filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and further ordered that the said proceeding before the said Commission be discontinued. Thereafter, by further orders, the said Commission postponed the effective date of said order of July 11, 1938 to January 1, 1940. (See secs. 9, 11 and 12 of bill of complaint and answers thereto.)

Defendants' Finding No. 15

15. That at the hearing in said proceeding entitled "Cancellation of Live Stock Services at Chicago, Investigation and Suspension Docket No. 4296" the plaintiff offered, among other things, to produce certain evidence relating to the loading and unloading of livestock at various other

public stockyards throughout the United States, and the parties performing such services, such evidence being fully described by the Commission in its report here before the court, and that upon objection of the protestants in said proceeding the said offer of evidence was rejected by the presiding Examiner, whose ruling thereon was thereafter sustained upon review by the Interstate Commerce Commission; and the court finds that the said rulings did not in anywise deprive the plaintiff of a fair and full hearing in that none of said evidence which was so refused to be received related to, or concerned in any way, the manner of publishing and assessing charges for the loading and unloading of livestock and the delivery of the same by the plaintiff at the Union Stock Yards in Chicago or any service rendered in connection therewith.

Comment: This proposed finding does not accurately describe the substance of the evidence which plaintiff sought [fol. 167] and attempted to introduce in the proceeding before the Commission. The statement in the last clause of the finding that plaintiff was not deprived of a fair and full hearing is an erroneous conclusion of law. The last portion of the finding is misleading as to the character of the evidence which plaintiff sought to introduce, and creates a misconception of the issue in the case and of plaintiff's purpose in seeking to introduce the evidence. Plaintiff is entitled to a complete recital of the general character (which is all the record shows) of the evidence it sought to introduce, and the action of the Examiner and of the Commission with respect thereto. The character of the evidence is described in the bill of complaint. In order to shorten its suggested finding plaintiff has referred to the matter set forth in section 10 of the complaint. If there is any objection on the part of defendants to incorporating a part of the bill by reference in the findings the matter incorporated by reference can be written out in full.

Plaintiff's Suggested Finding: At the hearing before the said Examiner in the City of Chicago plaintiff sought and attempted to introduce evidence to show the matters and things alleged in section 10 of its bill of complaint, but the Examiner presiding at said hearing refused to receive such evidence or any evidence pertaining to public stockyards other than plaintiff's stockyard. The only objection offered

by any party to the admission of such evidence was on the ground that it was irrelevant and immaterial. The said Examiner refused to permit plaintiff to ask questions of its witness designed to bring out such evidence; refused to permit plaintiff to show the qualifications of said witness to testify with respect to such evidence; refused to permit plaintiff to have exhibits containing such evidence marked [fol. 168] for identification by the reporter of said Commission; and refused to allow plaintiff to make specific offers of proof of such evidence. On or about September 8, 1937, plaintiff filed with the Interstate Commerce Commission a petition for further hearing before final submission, in which it briefly stated the nature and purpose of the evidence which it wished to adduce (to wit, the evidence described in section 10 of the bill of complaint filed herein) and which the said Examiner had refused to receive, and set forth the aforesaid refusals of the Examiner; and in said petition plaintiff prayed that said proceeding before said Commission be set for further hearing, that the Examiner assigned to hear the proceeding be instructed to receive the evidence rejected at said hearing in the City of Chicago or such part thereof as the Commission might deem material and relevant, that in any event that plaintiff be given an opportunity at a further hearing before final submission to make offers of proof of specific facts in respect of any such evidence not received or deemed immaterial or irrelevant by the said Commission, including the opportunity to have exhibits marked for identification and to offer them in evidence, and that the said Commission grant such further relief in the premises as might be meet. Plaintiff was unable in said petition to set forth specifically the evidence which it wished to offer because the rules of practice of the said Commission provided that "If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative." The said Commission by an order entered on November 8, 1937 denied said petition for further hearing before final submission. (See sec. 10 of bill of complaint and the answers [fol. 169] thereto; also see plaintiff's petition for further hearing before final submission, which is part of Ex. A in this Court.)

Defendants' Finding No. 16

16. That the order of the Interstate Commerce Commission dated July 11, 1938, in said proceeding entitled "Cancellation of Live Stock Services at Chicago, Investigation and Suspension Docket No. 4296" was made and entered by the Interstate Commerce Commission after it had conducted a fair and full hearing and upon consideration of the evidence of the parties and the arguments of counsel; that said order was based upon findings of fact which were made by the Interstate Commerce Commission, and which were set forth in its report in said proceeding, and that said findings of fact were fully supported by the evidence of the parties which was before the Interstate Commerce Commission, and which was considered by it in making said findings and order based thereon, and said findings of fact adequately support the conclusions based thereon by the Interstate Commerce Commission. The record of evidence heard and considered by the Interstate Commerce Commission was introduced in evidence in this court.

Comment: The first sentence consists almost wholly of erroneous conclusions of law and should be deleted. The last sentence would be more accurate if changed to read as suggested by plaintiff.

Plaintiff's Suggested Finding: The record of the proceedings before the Interstate Commerce Commission in I. & S. Docket No. 4296, including the evidence, was introduced and considered in this proceeding.

[fol. 170] Defendants' Findings Nos. 17, 18, 19 and 20

17. That prior to 1887 the plaintiff operated both its stockyard, including the loading and unloading platforms, chutes and pens for the receipt and delivery of livestock transported by railroad in interstate commerce, and its other railroad facilities in its own name. From 1887 to 1893 the railroad facilities, except the loading and unloading chutes and pens, were operated by a transfer association controlled by certain trunk-line carriers. In 1893 plaintiff resumed operation of all of its facilities. In 1897 plaintiff leased its railroad tracks, property and equipment for a term of fifty years to the Chicago & Indiana State Line Company, and retained for itself the loading and unload-

ing platforms and facilities used by it in connection with its stockyard business, and the loading and unloading of livestock at the stockyards when transported by railroad in interstate commerce from and into suitable pens. On January 1, 1898, the Chicago & Indiana State Line Company consolidated with the Chicago, Hammond & Western Railroad Company, and the consolidated company became known as the Chicago Junction Railway Company. Under the terms of the lease to the Chicago & Indiana State Line Company the plaintiff received first from the Chicago & Indiana State Line Company, and later from its successor, the Chicago Junction Railway Company, two-thirds of the profits derived from the operation of the leased properties. In 1907 the Chicago Junction Railway Company sold a belt line which it operated around the City of Chicago, and thereafter retained and operated only those railroad properties owned by the plaintiff which had been leased by the plaintiff to the Chicago & Indiana State Line Company. [fol. 171] At about the year 1907 the Chicago Junction Railways & Union Stock Yards Company, which was a holding company organized under the laws of the State of New Jersey, became the owner of 90 per cent of plaintiff's capital stock, and practically all of the stock of the Chicago Junction Railway Company.

18. That pursuant to the plaintiff's charter from the State of Illinois, and under and by virtue of an agreement with the Chicago Junction Railway Company, the trunk line carriers by railroad entering Chicago were granted trackage rights over the railroad tracks leased by the Chicago & Indiana State Line Company from the plaintiff. That under and by virtue of said agreement granting trackage rights to them, the trunk-line carriers have at all times placed cars in which livestock is being transported, or is to be transported, in interstate commerce, directly adjacent to the loading and unloading platforms of the plaintiff; that the trunk-line carriers have at all times paid a trackage charge for the use of the tracks leading to and from the Union Stock Yards, and the plaintiff has at all times continued to perform the unloading and loading service, supplying the platforms, chutes, pens and other facilities, and receiving the waybills thereon from the trunk lines and advancing to them the freight charges and collecting such charges from the consignees. From the very beginning the

operations of the plaintiff as described herein, to the present time, there has never been any change in the physical handling of the livestock transported by railroad to and from the Union Stock Yards at Chicago, as described herein, by the plaintiff and the trunk-line railroads.

19. In December, 1913, the lease from the Union Stock Yard and Transit Company of Chicago to the Chicago & [fol. 172] Indiana State Line Company was cancelled and a new lease was entered into whereby the plaintiff's railroad facilities, except those which were used for the loading and unloading of livestock, were leased in perpetuity to the Chicago Junction Railway Company at an annual rental of $600,000 in lieu of the two-thirds share of the net profits of the operation by the lessee which the plaintiff had received under the previous lease, the said sum received by plaintiff under the said 1913 lease, and presently under the lease next to be described, exceeds annually the amounts which accrued to the plaintiff as two-thirds of the net profits under the basis previously in effect.

20. On May 19, 1922, the Chicago Junction Railway Company made a lease indenture which was joined in by the plaintiff wherein it subleased the railroad properties which were held by it under lease from the plaintiff together with other property to the Chicago River & Indiana Railway Company for a period of 99 years, and thereafter at the option of the lessee in perpetuity, the said lease providing for an annual rental of $2,000,000. All of the capital stock of the Chicago River & Indiana Railway Company was acquired by the New York Central Railroad Company pursuant to an authorization, with certain conditions imposed thereon, which was granted by the Interstate Commerce Commission in a proceeding entitled "The Chicago Junction Case," 71 I. C. C. 631.

Comment: Aside from being incomplete, the principal objections to these proposed findings are: (a) the assumption at various places that loading and unloading platforms, chutes and pens are per se railroad rather than stockyard facilities; (b) the finding in No. 18 that plaintiff advances the freight charges to the railroads (Tr. 224); (c) the [fol. 173] finding in No. 20 to the effect that the authorization of the Commission in the Chicago Junction Case extended only to the acquisition of the stock of The Chicago

River and Indiana Railroad Company by the New York Central Railroad Company; and (d) the inference conveyed by the proposed findings that plaintiff formerly was engaged in the transportation of livestock.

Plaintiff's Suggested Findings: Upon the construction of its railroad in 1865 and until it leased its railroad properties in 1897, as hereinafter stated, plaintiff permitted the trunk-line railroads to transport livestock with their own engines and crews over its railroad tracks to and from its stockyard. From 1865 to 1887 plaintiff also permitted the individual trunk-line railroads to handle dead freight over its tracks with their engines and crews. From 1887 to 1893 plaintiff's railroad facilities were operated for the handling of dead freight by a transfer association controlled by the trunk-line railroads. In 1893 plaintiff began operation of its railroad facilities for the handling of dead freight. In 1897 plaintiff leased its railroad properties for a term of fifty years to the Chicago & Indiana State Line Railway Company, retaining for itself the loading and unloading platforms, chutes and pens and other facilities in its stockyard. In 1898 said lessee company consolidated with another company, and the consolidated company became known as Chicago Junction Railway Company, a corporation organized and existing under the laws of the State of Illinois. The trunk-line railroads entering the City of Chicago acquired trackage rights for the handling of livestock with their own power and crews over said railroad of said Chicago & Indiana State Line Railway and said Chicago Junction Railway Company. On December 1, 1913, [fol. 174] the aforesaid lease of 1897 was cancelled, and plaintiff granted, demised and leased all the railroad properties then owned by it to said Chicago Junction Railway Company in perpetuity, at a rental of $600,000 per year, by an indenture containing no defeasance clause or other provision giving plaintiff the right to recover possession of said properties. By supplemental indentures made on April 1, 1916, October 1, 1916 and January 1, 1918 plaintiff granted, demised and leased unto said Chicago Junction Railway Company, in perpetuity, certain additional lands in the City of Chicago. (Exs. 1 and 3.)

On May 19, 1922, said Chicago Junction Railway Company leased all its railroad properties, including all the properties granted, demised and leased to it in perpetuity

by the plaintiff, to The Chicago River and Indiana Railroad Company (a railroad corporation organized under the general railroad incorporation act of the State of Illinois in the year 1904) for a term of ninety-nine years and thereafter, at the election of the lessee, in perpetuity; and at the same time all the capital stock of The Chicago River and Indiana Railroad Company was acquired by The New York Central Railroad Company. Upon the execution of said lease of May 19, 1922, said Chicago Junction Railway Company cancelled its tariffs and ceased doing business as a common carrier. The making of said lease and the acquisition of said capital stock were approved and authorized by an order of the Interstate Commerce Commission made and entered on May 16, 1922 in a proceeding known as Chicago Junction Case, 71 I. C. C. 631. Plaintiff was a party to said lease, and by a covenant therein contained consented to and ratified it. The properties covered by said lease were demised to The Chicago River and Indiana Rail-
[fol. 175] road Company "with the right, power and authority in the River Company (i. e., The Chicago River and Indiana Railroad Company) * * * thereon to pursue the business of a common carrier." The lease further gave The Chicago River and Indiana Railroad Company "the right to conduct, operate and manage * * * the premises and properties by this instrument demised." In said lease The Chicago River and Indiana Railroad Company covenanted and agreed "to assume and to promptly and fully perform, during the term hereof * * * all obligations * * * imposed on either of said corporations (i. e., plaintiff or Chicago Junction Railway Company) or the owner from time to time of any of the properties hereby demised, by any present or future laws of the United States or of the State of Illinois or by any ordinance or regulation, present or future, of the City of Chicago, or other public body, affecting or relating to said properties, and that with respect to said properties it will promptly and fully perform and comply with all such laws, ordinances and regulations." (Tr. 17-19, 23, 124, 325; Exs. 1 and 3 and report and order in Chicago Junction Case included as part of Ex. A in this Court.)

The properties of the plaintiff granted, demised and leased by it in perpetuity to said Chicago Junction Railway Company, as aforesaid, did not include plaintiff's platforms, chutes and pens used in the loading and unloading

of carload shipments of livestock for the trunk-line railroads. Since May 19, 1922 all railroad properties formerly owned, possessed or operated by plaintiff and all railroad properties previously owned, leased, possessed or operated by said Chicago Junction Railway Company have been, and now are, operated by The Chicago River and Indiana Railroad Company as a common carrier by rail for hire [fol. 176] as a part of the system of railroads commonly known as the New York Central System. Since May 19, 1922, neither plaintiff nor said Chicago Junction Railway Company has operated any railroad or transported any persons or property; and neither plaintiff nor said Railway Company now operates any railroad. (Tr. 9-16; Ex. 1.)

Plaintiff does not possess, operate or control in any way, either directly or indirectly, any railroad or part thereof or any cars, locomotives or other railroad rolling stock or other railroad facilities; it does not transport, nor hold itself out to transport, persons or property from place to place by rail or otherwise; it is not, either directly or indirectly, associated with, or controlled by, or in the control of, or affiliated with, any common carrier by railroad or any person, firm or corporation owning, controlling or operating any common carrier by railroad; it does not, directly or indirectly, have any interest in, nor share in the profits of, any common carrier by railroad; it does not issue and is not a party to bills of lading or waybills; it is not treated as a common carrier by the railroads serving its stockyard; and it does not perform, nor hold itself out to perform, any services or acts as a common carrier by railroad or otherwise. (Tr. 14, 23-25, 125, 217-218, 229-230, 275-305, 282-283, 302.)

Defendants' Finding No. 21

21. On February 28, 1920, the plaintiff had on file with the Interstate Commerce Commission its tariffs wherein it held itself out to perform the service of loading and unloading livestock transported in interstate commerce by railroad to and from the Union Stock Yards at Chicago, which said tariffs defined such service so performed and covered the charges to be assessed thereon. At no time [fol. 177] since February 28, 1920, has the Interstate Commerce Commission, upon the petition of the plaintiff, or otherwise, issued any certificate that the present or future public convenience and necessity require or will require the

abandonment by the plaintiff of its loading and unloading platforms, chutes and pens used in the receipt and delivery of livestock at the Union Stock Yards in Chicago when transported by railroad in interstate commerce, or the operation thereof by the plaintiff.

Comment: The first sentence of the proposed finding is misleading, and is a duplication of certain other findings proposed by defendants. The second sentence of the proposed finding is immaterial, and is not based on any evidence of record.

Defendants' Finding No. 22

22. That in the Transportation Act of 1920 Congress enacted as amendment to the Interstate Commerce Act known as Section 15, paragraph (5), of the Interstate Commerce Act, as amended, which provided in part as follows:

"(5) Transportation of livestock in carload lots; services included.—Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations."

That thereafter the plaintiff continued to perform, and [fol. 178] does now perform, all necessary service in connection with the loading and unloading of ordinary livestock transported in interstate commerce by railroad in carload lots at the Union Stock Yards in Chicago, including the delivery of such livestock into suitable pens, and that plaintiff has at all times, and does now, refuse to permit said service of loading and unloading to be performed by any other person or corporation, and will only permit such service to be performed by its own employees.

That thereafter, in an Act of Congress approved August 15, 1921, known as the Packers and Stockyards Act, 1921 (U. S. C. Title 7, secs. 181-229) it was provided in part that "Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon

the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

Comment: This finding consists largely of references to and quotations from statutes which have no place in findings of fact. The rest of the proposed finding consists of repetitions of matter previously covered and discussed.

Defendants' Finding No. 23

23. That the plaintiff, in undertaking to perform, and in performing the described services commencing or terminating the service of interstate transportation of livestock by railroad, is a common carrier engaged in transportation by railroad, and subject as such to the Interstate Commerce Act; that in the contemplation of its charter the plaintiff is engaged in the public calling of operating a public stockyards and a railroad as an adjunct thereto; that plaintiff has at all times continued to, and does now, perform exclu- [fol. 179] sively the service of loading and unloading ordinary livestock transported by railroad in carload lots at the Union Stock Yards into and from suitable pens, and all services in connection with the receipt and delivery of such livestock so transported; that in addition the plaintiff has a substantial pecuniary interest in other railroad property which it owns, and which it has leased to others; that plaintiff has continued to exist and operate under and by virtue of its special charter granted it by a special act of the legislature of the State of Illinois in 1865, and that under and by virtue of the lease of its railroad properties other than those which it uses in the loading and unloading, receipt and delivery of livestock transported to and from the Union Stock Yards, it has agreed that it will, when requested by the lessee, and under the conditions prescribed in the said lease, exercise in its own name and right its power of eminent domain for the benefit of said lessee as such power was granted to it in said special charter.

Comment: This finding consists of erroneous conclusions of law and matters already covered by other findings proposed by defendants. If it is felt that the provisions of the lease with respect to plaintiff's right of eminent domain are material, plaintiff suggests the finding hereinafter set out.

Plaintiff's Suggested Finding: The aforesaid lease of May 19, 1922, contained the following covenant: "If * * * The River Company (i. e., The Chicago River and Indiana Railroad Company) shall require or desire any additional lands or other properties for railroad purposes identified with the use and occupation of the premises and properties herein demised, which, for any reason whatever, under and by virtue of the terms of its own charter, it may not condemn and which either the Junction Company [fol. 180] or the Yard Company may, under the terms of its charter, condemn, then, in such case, the appropriate party agrees that it will at the request of the River Company, and upon receiving the amount of money required for such purpose including litigation expenses, exercise its powers of condemnation with respect to any such land or lands, and upon the acquisition thereof convey or otherwise deliver the same as may be appropriate to the River Company, * * *." (Ex. 3, p. 23.)

Defendants' Finding No. 24

24. That in holding itself out to perform, and in performing these services of loading and unloading the livestock transported in interstate commerce by railroad, and the receipt and delivery thereof at the Union Stock Yards, the plaintiff has at all times, and does now, act on its own behalf pursuant to the authorization of its charter as a public utility and a common carrier; that no contract or agreement creating any relationship of principal and agent exists as between the trunk-line carriers and the plaintiff; that such relationship between said parties as exists is created by the Interstate Commerce Act, and that in performing the services of loading and unloading, receipt and delivery of livestock, the plaintiff is acting on its own behalf and is performing terminal services as a common carrier subject to regulation by the Interstate Commerce Commission in respect to the beginning and the completion of the transportation of livestock in interstate commerce by railroad.

Comment: This finding consists entirely of conclusions of law, which have no place in findings of fact. The conclusions of law are erroneous. The first is essentially the ultimate question involved in this proceeding. The other conclusions, which pertain to the relationship between plaintiff

[fol. 181] and the railroads, are contrary to the evidence. (Tr. 39, 41, 49; Ex. 7.)

Plaintiff's Suggested Conclusions of Law

1. The order of the Interstate Commerce Commission herein assailed is invalid, null and void because under the evidence of record in the proceeding before the Interstate Commerce Commission in I. & S. Docket No. 4296 plaintiff is not a common carrier.

2. Said order is invalid, null and void because under the evidence of record in the said proceeding before the Interstate Commerce Commission plaintiff is not a common carrier by railroad.

3. Said order is invalid, null and void because plaintiff is not a common carrier subject to the provisions of the Interstate Commerce Act.

4. Said order is invalid, null and void because plaintiff is not a common carrier by railroad subject to the provisions of the Interstate Commerce Act.

5. Said order is invalid, null and void because there is no law which requires plaintiff to maintain on file with the Interstate Commerce Commission any tariff stating the charges made by plaintiff for the services of loading or unloading carload shipments of livestock at its stockyard in the City of Chicago.

6. Said order is invalid, null and void because the Interstate Commerce Commission in said proceeding failed and refused to receive competent, relevant and material evidence proffered by plaintiff, and failed and refused to permit the plaintiff to qualify its witness, or have exhibits marked for identification, or make specific offers of proof with respect to competent, relevant and material evidence.

[fol. 182-183] 7. Said order is invalid, null and void because it was made and entered by the Interstate Commerce Commission without according to plaintiff, although duly demanded by the plaintiff, a full hearing as required by paragraph 7 of Section 15 of the Interstate Commerce Act.

Respectfully submitted, Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Thomas T. Cooke, Bryce L. Hamilton, Solicitors for Plaintiff.

March 2, 1939.

[fol. 184] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FORM OF DECREE PROPOSED BY DEFENDANTS AND INTERVENERS—Filed March 7, 1939

[fol. 185] The bill of complaint of The Union Stock Yard and Transit Company of Chicago in a suit brought by the plaintiff under the provisions of the Urgent Deficiencies Appropriation Act (38 Stat. L. 219; 28 U. S. C. secs. 43-48) to enjoin, set aside, annul and suspend an order entered by the Interstate Commerce Commission on July 11, 1938, in a proceeding known as Investigation and Suspension Docket No. 4296, Cancellation of Live Stock Services at Chicago, coming on for final hearing before the Court composed of Evan A. Evans, Circuit Judge, and Charles E. Woodward and Michael L. Igoe, District Judges, and the plaintiff appearing by Messrs. Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Thomas T. Cooke, and Bryce L. Hamilton, and the defendant United States of America appearing by Elmer B. Collins, Special Assistant to the Attorney General of the United States, and the defendant Interstate Commerce Commission appearing by Daniel W. Knowlton, its Chief Counsel, and certain railroad companies, interveners herein on behalf of the defendants, to wit, Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company, appearing by Kenneth F. Burgess, Douglas F. Smith and C. Bouton McDougal; and National Live Stock Marketing Association, intervener on behalf of the defendants, appearing by Lee J. Quasey; the record of the proceeding before the Commission, including the evidence, was introduced in evidence in this Court, and the Court having heard the evidence of the parties and having heard argument thereon, and the Court being fully and duly advised in the premises, does find:

Findings of Fact

1. That plaintiff, The Union Stock Yard and Transit Company of Chicago, is a corporation which was organized in 1865 under a special charter from the State of Illinois, and [fol. 186] that in said charter it was granted the power to build, own and operate a railroad and a stockyard, and for its purposes as a railroad, to exercise the power of eminent domain.

2. That at said time, as authorized in its charter, plaintiff acquired real estate and constructed a stockyard within the present limits of the City of Chicago known as the Union Stock Yards; that at all times since, and now, same has been and is operated as a public stockyards, and since 1921 has been so designated pursuant to law; plaintiff also constructed approximately 300 miles of railroad tracks consisting of main lines connecting with railroad trunk lines entering Chicago, and switches to various industries located adjacent to its tracks.

3. That now, and at all times since the construction of the Union Stock Yards, plaintiff has owned, maintained and exclusively operated, the loading and unloading platforms, chutes and pens, whereby livestock transported by railroad in interstate commerce and consigned by and to persons at the Union Stock Yards, is loaded into or unloaded from railroad cars in which it is transported; said facilities and the operation thereof by plaintiff constitute the only means of ingress to and egress from the said public stockyards for livestock transported to and from said yards by railroad.

4. That following and pursuant to the decision of the Supreme Court of the United States in the case entitled United States v. Union Stock Yard and Transit Company, 226 U. S. 286, decided December 9, 1912, plaintiff filed its tariffs with the Interstate Commerce Commission wherein it named its charges for loading and unloading livestock at the Union Stock Yards, being transported by railroad in interstate commerce from and to said yards; and at all times thereafter, (except for a period of several months in 1919 when they were withdrawn by plaintiff, Livestock Loading and Unloading Charges, 52 I. C. C. 209) the plaintiff has maintained, and does now maintain, its said tariffs on file with the Interstate Commerce Commission, and plaintiff from time to time, by invoking the processes of the Inter-

state Commerce Act, has increased the amount of its said charges.

5. That the said service of loading and unloading of livestock by plaintiff and the furnishing of facilities therefor, is an inseparable and an indispensable part of the interstate transportation by railroad of livestock to and from the Union Stock Yards; said unloading and loading facilities and the operation thereof by the plaintiff, constitute terminal facilities and services required by statute and necessary to the completing and commencing of interstate transportation of livestock by railroad to and from said Union Stock Yards; and plaintiff has at all times held itself out to furnish such terminal facilities and to perform such terminal services.

6. That in respect to livestock transported to or from the Union Stock Yards at Chicago the railroad cars in which the livestock is loaded or to be loaded, have at all times and are now transported to and from plaintiff's loading and [fol. 187] unloading platforms, chutes and pens by the trunk line carriers (among whom are the railroad company interveners herein); that under and by virtue of the tariffs of the trunk line carriers on file with the Interstate Commerce Commission the charges of the plaintiff for its service in loading and unloading said livestock are covered and compensated for by the through rates for the interstate transportation of said livestock between the Union Stock Yards and points of origin or destination, which through rates are assessed against the shipper, consignee or owner of the livestock.

7. That plaintiff owns and operates terminals and terminal facilities, including freight depots, yards and grounds, used and necessary in the transportation and delivery of livestock transported by railroad in interstate commerce; that plaintiff has undertaken and held itself out publicly for hire, to perform for all alike, and does now so perform, services rendered in the transportation of property and livestock and services in connection with the receipt, delivery and handling of property and livestock transported in interstate commerce by railroad; and that plaintiff has undertaken publicly for hire, to perform for all alike, all necessary service of making delivery into suitable pens at the Union Stock Yards in Chicago of inbound shipments of ordinary

livestock in carload lots moving by railroad in interstate commerce, and the receipt and loading at said Union Stock Yards of shipments of ordinary livestock into railroad cars moving out of said yards in interstate commerce by railroad; that plaintiff engages in the transportation of livestock by railroad under such circumstances that its business is affected with a public interest and is a public business, and plaintiff performs the said transportation service as a common carrier and not as a private carrier.

8. That prior to 1918, plaintiff's charge as published in its tariffs on file with the Interstate Commerce Commission for unloading livestock was 25 cents per car; by invoking the processes of the Interstate Commerce Act as a common carrier by railroad plaintiff has increased its said charge to the present tariff basis of $1.25 per car; since the last increase in its rates in December, 1934, plaintiff has unsuccessfully employed a number of devices in an effort to obtain a further substantial increase in its said charges without establishing the reasonableness thereof to the Interstate Commerce Commission, and it now seeks to eliminate itself from the jurisdiction of the Commission to enable it to make such further increase in its charges without justifying the reasonableness thereof before the Commission.

9. That the plaintiff, by supplements to its tariffs on file with the Interstate Commerce Commission proposed to cancel all of its tariffs then on file with the Interstate Commerce Commission, which said supplements contained the notation, "No tariffs of this Company will hereafter be filed with the Interstate Commerce Commission"; that the Interstate Commerce Commission suspended the operation of said supplements and held hearings respecting the lawfulness thereof; in opposition to the suspended supplements there appeared as protestants the railroad companies which are interveners herein, and which are engaged in the transportation of livestock by railroad in interstate commerce to [fol. 188] and from Chicago, and in opposition to the suspended schedules there appeared also representatives of National Live Stock Marketing Association, American National Live Stock Association, National Wool Growers' Association, and Texas-Southwestern Cattle Raisers' Association, which said organizations represent the producers, owners and shippers of livestock, and that after hearing the

evidence and the arguments of the parties orally and on brief, the Interstate Commerce Commission made its report and entered its order which is herein sought by the plaintiff to be enjoined, set aside and annulled.

10. That at the hearing in said proceeding entitled "Cancellation of Live Stock Services at Chicago, Investigation and Suspension, Docket No. 4296" the plaintiff offered to produce certain evidence relating to the loading and unloading of livestock, and the parties performing such services, at various public stockyards located at points throughout the United States other than Chicago, Illinois; such evidence being fully described by the Interstate Commerce Commission in its report here before the Court; upon objection of the protestants in said proceeding the said offer of evidence was rejected by the presiding Commissioner and Examiner, whose ruling thereon was thereafter sustained upon review by the Interstate Commerce Commission; none of said evidence, so refused to be received, related to, or concerned in any way, the manner of publishing and assessing charges for the loading and unloading of livestock by the plaintiff at the Union Stock Yards in Chicago or any service rendered in connection therewith; that the order of the Interstate Commerce Commission here sought to be enjoined, was made and entered after a fair and full hearing and upon consideration of all proper evidence offered to it, and the arguments of counsel; that said order was based upon findings of fact by the Commission duly set forth in its report; that said findings of fact were fully supported by the evidence before the Interstate Commerce Commission, and said findings of fact adequately support the conclusions based thereon by the Commission.

11. That the history and facts concerning the organization of plaintiff's business, its property, its operations, and its various leases of railroad facilities other than its loading and unloading facilities, are correctly stated and described in the report of the Commission before us; for many years prior to 1913 plaintiff received as rental for the railroad facilities leased by it two-thirds of the net profits of the operation of said facilities by the lessee; now, and at all times since 1913, plaintiff receives and has received as rental for said facilities, annual amounts which

are greater than the average annual rentals which accrued to the plaintiff as two-thirds of the net profits under the basis previously in effect.

12. That pursuant to the plaintiff's charter from the State of Illinois, the trunk line carriers by railroad entering Chicago obtained trackage rights over the railroad tracks leased by the plaintiff, and by use of such trackage rights, the trunk line carriers have at all times since 1865 placed cars in which livestock is being transported, or is to be transported, in interstate commerce, directly adjacent to the loading and unloading platforms of the plaintiff; that the trunk line carriers have at all times paid a trackage charge for the use of the tracks leading to and [fol. 189] from the Union Stock Yards, and the plaintiff has at all times continued to perform the unloading and loading service, supplying the platforms, chutes, pens and other facilities, and receiving the waybills thereon from the trunk lines, and collecting the full transportation charges from the consignees. From the beginning of the operations of the plaintiff as described herein, to the present time, there has never been any change in the physical handling of the livestock transported by railroad to and from the Union Stock Yards at Chicago, as described herein, by the plaintiff and the trunk line railroads.

13. That in the Transportation Act of 1920 Congress enacted an amendment to the Interstate Commerce Act known as Section 15, paragraph (5), of the Interstate Commerce Act, as amended; that thereafter the plaintiff continued to perform, and does now perform, all necessary service in connection with the loading and unloading of ordinary livestock transported in interstate commerce by railroad in carload lots at the Union Stock Yards in Chicago, including the delivery of such livestock into suitable pens, and that plaintiff has at all times, and does now, refuse to permit said service of loading and unloading to be performed by any one other than its own employees.

14. That the plaintiff, in undertaking to perform, and in performing the described services commencing or terminating the service of interstate transportation of livestock by railroad, is a common carrier engaged in transportation by railroad, and subject as such to the Interstate Commerce Act; that in the contemplation of its charter the

plaintiff is engaged in the public calling of operating a public stockyards and a railroad as an adjunct thereto; that plaintiff has at all times continued to, and does now, perform exclusively the service of loading and unloading ordinary livestock transported by railroad in carload lots at the Union Stock Yards into and from suitable pens, and all services in connection with the receipt and delivery of such livestock so transported; that in addition the plaintiff has a substantial pecuniary interest in other railroad property which it owns, and which it has leased to others; that plaintiff has continued to exist and operate as a railroad under and by virtue of its special charter granted it by a special act of the legislature of the State of Illinois in 1865, and that under and by virtue of the lease of its railroad properties other than those which it uses in the loading and unloading, receipt and delivery of livestock transported to and from the Union Stock Yards, it has agreed that it will, when requested by the lessee, and under the conditions prescribed in the said lease, exercise in its own name and right its power of eminent domain for the benefit of said lessee as such power was granted to it in said special charter; none of the leases entered into by plaintiff and described by the Commission in its report, operated to divest plaintiff of its status as a common carrier engaged in transportation by Railroad and subject as such to the Interstate Commerce Act.

15. That in holding itself out to perform, and in performing these services of loading and unloading the livestock transported in interstate commerce by railroad, and the receipt and delivery thereof at the Union Stock Yards, the plaintiff has at all times, and does now, act on its own behalf pursuant to the authorization of its charter as a public utility and a common carrier; that no contract or [fols. 190-192] agreement creating any relationship of principal and agent exists as between the trunk line carriers and the plaintiff; that such relationship between said parties as exists is created by the Interstate Commerce Act, and that in performing the services of loading and unloading, receipt and delivery of livestock, the plaintiff is acting on its own behalf and is performing terminal services as a common carrier subject to regulation by the Interstate Commerce Commission in respect to the beginning and the completion of the transportation of livestock in interstate commerce by railroad.

CONCLUSIONS OF LAW

1. That The Union Stock Yard and Transit Company of Chicago is a common carrier engaged in the transportation of property by railroad, subject to the provisions of the Interstate Commerce Act, and that it is engaged in the transportation by railroad of livestock in interstate commerce transported to and from the Union Stock Yards at Chicago.

2. That the order of the Interstate Commerce Commission herein, requiring plaintiff to cancel the tariff supplements by which plaintiff proposed to cancel its rates on file with the Commission, is a lawful and valid order within the jurisdiction of the Interstate Commerce Commission as defined in the Interstate Commerce Act, and that said order was entered after a full and fair hearing, is based upon adequate findings of facts which are supported by the evidence before it and before the Court, and is in all respects lawful and binding upon the plaintiff.

3. That the Commission's exclusion of the evidence offered by plaintiff before the Commission, described by the Commission in its report, and referred to in the Court's tenth finding of fact herein was not erroneous, and did not deprive plaintiff of a full and fair hearing.

4. The bill of complaint herein should be dismissed.

5. Defendants should recover their taxable costs herein.

Dated at Chicago, Illinois, March —, 1939.

—— ——, Circuit Judge. —— ——, —— ——, District Judges.

[fol. 193] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—March 9, 1939

The above entitled suit coming on to be heard, and the plaintiff having offered its testimony which was received, and the defendants having offered their testimony which

was also received, and the various counsel of the various interested parties having been heard, the court finds as

Findings of Fact

1. This suit was brought under the provisions of the Urgent Deficiency Appropriation Act (28 U. S. C. secs. 43-48) to enjoin and set aside an order of the Interstate Commerce Commission made July 11, 1938, in a proceeding known as Investigation and Suspension Docket No. 4296, Cancellation of Live Stock Services at Chicago.

2. The plaintiff is an Illinois corporation which, by its charter, was granted a power to build, own and operate a stockyards and a railroad and for the latter purpose to exercise the power of eminent domain.

3. Plaintiff acquired and constructed a stockyards within the present limits of the City of Chicago, which is known [fol. 194] as the Union Stock Yards; that it has operated said Stock Yards continuously since 1865; and that said yards have been designated, pursuant to law, a public stock yards and has been so operated since 1921.

4. Plaintiff also constructed three hundred miles of railroad track consisting of main lines with trunk lines entering Chicago and switches to various industries located adjacent to its tracks. Plaintiff leased its railway property in 1897, and prior thereto it permitted individual trunk line railroads to transport live stock, with their own engines and crew over its railroad tracks, to and from the Stock Yards. Its 1897 lease was to Chicago and Indiana State Line Railway Company, retaining for itself the loading and unloading platforms, chutes, pens, and other facilities in its stock yard. In 1898 the lessee consolidated with another company and became known as Chicago Junction Railroad Company, an Illinois corporation. On December 1, 1913, plaintiff's lease to the Chicago and Indiana State Line Railroad was cancelled, and plaintiff leased the said property to the said Chicago Junction Railway Company in perpetuity. In 1922, the Chicago Junction Railway Company leased the property covered by plaintiff's lease to the Chicago River and Indiana Railway Company. At or about the same time the stock of said Chicago River and Indiana Railway Company was acquired by the New York Central Railway Company.

5. Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property.

6. The court finds that the only question in issue is the jurisdiction of the Interstate Commerce Commission to make the order which the plaintiff here seeks to set aside. [fol. 195] Plaintiff does not question the sufficiency of the evidence to support the finding, nor does it question the sufficiency of the findings to support the order. It denies that the Interstate Commerce Commission had jurisdiction of the subject matter or authority to enter the order complained of.

7. The court further finds that jurisdiction was denied by plaintiff because plaintiff is not a common carrier and was not, at the time said order was entered. It also denies that the services for which charges covered by the order were made, were interstate transportation services.

8. Plaintiff is and was at the time of the hearing by the Interstate Commerce Commission, and when the Interstate Commerce Commission made its order, a common carrier within the meaning of the Interstate Commerce Act.

9. The court finds that the services covered by the order of the Commision which are complained of, were interstate transportation services within the meaning of the Interstate Commerce Act.

10. The court finds that the shipment of livestock from points of origin to the Union Stock Yards requires the common carrier to unload the stock from the cars and deliver them into the pens of the Union Stock Yards.

11. The court finds that the unloading of the stock and driving of them to the pens in the Stock Yards constitute interstate transportation services which are subject to the regulation of the Interstate Commerce Commission.

12. The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards [fols. 196-197] except through the services furnished by plaintiff.

As Conclusions of Law, the court finds:

1. The Interstate Commerce Commission had jurisdiction to enter the order complained of.

2. The plaintiff is a common carrier and subject to the regulation of the Interstate Commerce Commission.

3. The Plaintiff is engaged in the transportation by railroad of livestock in Interstate Commerce and the services it renders in unloading the livestock from the cars and delivering them to the pens in the Stock Yards are interstate transportation services and subject to the regulation and control of the Interstate Commerce Commission.

4. The order of the Interstate Commerce Commission which the plaintiff here seeks to set aside is a lawful and valid order of the said Interstate Commerce Commission and within the jurisdiction conferred upon the said Commission by the Interstate Commerce Act.

5. The bill of complaint should be dismissed and the defendants should recover their taxable costs.

Either side may have ten days within which to file exceptions to these findings and conclusions.

March 9th, 1939.

Evan A. Evans, Circuit Judge. Charles E. Woodward, District Judge. M. L. Igoe, District Judge.

[fols. 198-199] In United States District Court for the Northern District of Illinois, Eastern Division

In Equity. No. 16200

The Union Stock Yard and Transit Company of Chicago, Plaintiff,

vs.

United States of America and Interstate Commerce Commission, Defendants

Final Decree—March 9, 1939

This cause coming on to be heard on final hearing, and the court having made its findings of fact and conclusions of law;

It Is Ordered, Adjudged and Decreed as follows:

1. The bill of complaint is hereby dismissed.

2. Defendants shall recover from the plaintiff their taxable costs and disbursements.

Dated at Chicago, Illinois, March 9th, 1939.

Evan A. Evans, Circuit Judge. Charles E. Woodward, M. L. Igoe, District Judges.

[fol. 200] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF DEFENDANTS AND INTERVENING DEFENDANTS TO AMEND OR MODIFY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE COURT—Filed March 18, 1939

Pursuant to Rule 52, Federal Rules of Civil Procedure, and leave granted by this Court, defendants and intervening defendants herein, hereby except to the findings of fact and conclusions of law entered by the Court on March 9, 1939 as stated below, and respectfully move that the Court:

1. Amend its findings of fact and conclusions of law and make findings and conclusions in addition to those entered March 9, 1939, by adopting and entering all of the findings of fact and conclusions of law filed and submitted to the Court by these defendants on March 7, 1939.

As grounds for this part of their motion defendants suggest that, (a) the evidence establishes the additional important facts set forth in their proposed findings and the Court should adopt the same in order that its findings of fact will more fully and completely set forth all of the essential facts disclosed by the evidence, and (b) while the conclusions of law entered by the Court constitute an adequate basis for the decree, counsel for defendants suggest that the conclusions submitted by them are more comprehensive and more specific than those entered by the Court.

[fol. 201] 2. (a) Amend the introductory paragraph to the Court's findings by substituting the word "no" for the word "their" in line 3, and eliminating the words "which was also received" in lines 3 and 4 of said paragraph.

This correction is proper because the defendants offered no testimony before the Court.

(b) For the purpose of clarification and harmonization with the findings, conclusions and decision as a whole, amend and modify finding of fact No. 5 to read as follows:

5. Since May 5, 1922, neither plaintiff nor the Chicago Junction Railway Company has engaged in the operation of locomotives over railroad tracks.

Plaintiff is now engaged in the transportation of property by railroad within the terms of Sections 1 and 15 of the In-

terstate Commerce Act, as declared by the Court in its findings of fact Numbered 8, 9 and 11, and in its conclusion of law Number 3. It is submitted that the amendment of finding Number 5, as proposed herein, expresses the intent of the Court on this point as shown by the Court's findings and conclusions as a whole.

(c) To clarify and harmonize findings of fact 8, 9, 10 and 11 with the conclusions and decision of the Court, amend those findings by inserting the words "by railroad" in four places, namely, as follows: Following the word "carrier" in line 3 of finding No. 8; following the word "services" in line 3 of finding No. 9; following the word "carrier" in line 3 of finding No. 10; and following the word "services" in line 3 of finding No. 11.

These amendments are proper because the Interstate Commerce Act, as amended, refers to several kinds of common carriers in addition to carriers by railroad, for example, carriers by motor vehicle and carriers by water.

(d) For the reasons mentioned in paragraph (c), amend conclusion of law No. 2 by inserting the words "by rail-
[fols. 202-203] road" following the word "carrier" in the first line of conclusion No. 2.

Elmer B. Collins, for the United States of America. Daniel W. Knowlton, for Interstate Commerce Commission. Kenneth F. Burgess, Douglas F. Smith, for Intervening Railroad Defendants. Lee J. Quasey, for Intervening Defendant, National Live Stock Marketing Association.

March 17, 1939.

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF PLAINTIFF FOR AMENDMENT OF FINDINGS AND ADDITIONAL FINDINGS, AND FOR AMENDMENT OF FINAL DECREE, AND BRIEF IN SUPPORT THEREOF—Filed March 20, 1939

Now comes plaintiff, The Union Stock Yard and Transit Company of Chicago, pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, and moves the Court to amend its findings entered herein on March 9, 1939, to make additional

findings, and to amend the final decree entered herein on said date as follows, for the reasons stated:

Court's Finding No. 2

2. The plaintiff is an Illinois corporation which, by its charter, was granted a power to build, own and operate a stockyards and a railroad and for the latter purpose to exercise the power of eminent domain.

[fol. 205] Comment: This finding, while substantially correct, does not indicate that the principal function of plaintiff was to be that of operating a general union stockyard, and that the operation of a railroad and of a hotel were to be incidental thereto (Ex. 2).*

Plaintiff was not organized under the general railroad corporation act of Illinois; instead, it is a hybrid corporation organized under a special act of the Legislature of Illinois at a time when the granting of special charters was permissible. It was authorized only to construct a railway to connect its stockyard with the tracks of railroads terminating in Chicago, and its power to take land was limited to that provided in an act of 1852 and amendments thereof. The act of 1852 and amendments were repealed in 1872 (Ill. Rev. Stat. 1937, c. 47, sec. 16), and it is probable that the plaintiff does not now possess the power of eminent domain.

In its report in I. & S. 4109, which was reaffirmed by the Commission in the order here involved, much was made of the point that if the plaintiff is not subject to regulation, the trunk-line railroads will be at its mercy insofar as its charges for loading and unloading were concerned. The Commission entirely disregarded the fact that by its charter plaintiff's right to collect charges for the handling of livestock was limited to the making of "reasonable charges." Plaintiff is entitled to a finding as to its charter limitations.

Since finding No. 2 purports to deal with the provisions of plaintiff's charter, fairness to plaintiff requires that all pertinent provisions be included in the finding. Plaintiff

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*The record before the Commission was introduced in evidence as plaintiff's Exhibit A. References herein to transcript and exhibits are to pages of the transcript and exhibits as numbered by the Commission unless otherwise stated.

therefore requests that said finding No. 2 be amended to read as set forth below:

[fol. 206] Plaintiff's Requested Finding No. 2: Plaintiff, The Union Stock Yard and Transit Company of Chicago, was incorporated in the year 1865 by a special act of the Legislature of the State of Illinois. It was authorized by said act to construct and operate a general union stockyard for livestock, to construct and operate a hotel for the accommodation of the public doing business at the yards, to construct a railway to connect its stockyard with the tracks of railroad terminating in Chicago, and to operate said railway. By said act plaintiff was given the power to take land "for the purpose of constructing said railroad track (but for no other purpose) * * * in the manner provided for in the 'Act to amend the law condemning the right of way for purposes of internal improvement,' approved June 22, A. D. 1852, and the acts amendatory thereof, * * *." Said act also provides that for the care, subsistence and handling of livestock plaintiff "may take and require to be paid, such reasonable charges as may be deemed just and proper." (Tr. 6; Ex. 2)

Court's Finding No. 3

3. Plaintiff acquired and constructed a stockyards within the present limits of the City of Chicago, which is known as the Union Stock Yards; that it has operated said Stock Yards continuously since 1865; and that said yards have been designated, pursuant to law, a public stock yards and has been so operated since 1921.

Comment: This finding is substantially correct, except that plaintiff's stockyard at the time of its original construction was not located within the City of Chicago (Tr. 6; Ex. 2). The finding of the Court, however, is incomplete in that it does not show that plaintiff is subject to regulation [fol. 207] by the Secretary of Agriculture under the Packers and Stockyards Act, 1921 (7 U. S. Code, secs. 201-229). Plaintiff therefore requests that the finding be changed to read as follows:

Plaintiff's Requested Finding No. 3: Upon receiving its charter plaintiff acquired approximately half a section of land in what is now a part of the City of Chicago, Illinois, and constructed thereon a large stockyard known as Union

Stock Yards, which was opened for business in 1865, and has since that time been operated by plaintiff as a public stockyard, and since 1921 has been duly designated as a stockyard subject to the provisions of the Packers and Stockyards Act, 1921 (7 U. S. Code, secs. 201-229). Pursuant to the requirements of said act plaintiff, since December 30, 1921, has had on file, and still has on file, with the Secretary of Agriculture schedules stating its rates and charges for various stockyard services as defined in Section 301 of said act (7 U. S. Code, sec. 201) furnished by plaintiff at its said stockyard, except the services of loading and unloading livestock for railroads (Tr. 6-8, 26, 29; Exs. 1 and 8).

Court's Finding No. 4

4. Plaintiff also constructed three hundred miles of railroad track consisting of main lines with trunk lines entering Chicago and switches to various industries located adjacent to its tracks. Plaintiff leased its railway property in 1897, and prior thereto it permitted individual trunk-line railroads to transport livestock, with their own engines and crew over its railroad tracks, to and from the Stock Yards. Its 1897 lease was to Chicago and Indiana State Line Railway Company, retaining for itself the loading and unloading platforms, chutes, pens, and other facilities in its stock-[fol. 208] yard. In 1898 the lessee consolidated with another company and became known as Chicago Junction Railroad Company, an Illinois corporation. On December 1, 1913, plaintiff's lease to the Chicago and Indiana State Line Railroad was cancelled, and plaintiff leased the said property to the said Chicago Junction Railway Company in perpetuity. In 1922, the Chicago Junction Railway Company leased the property covered by plaintiff's lease to the Chicago River and Indiana Railway Company. At or about the same time the stock of said Chicago River and Indiana Railway Company was acquired by the New York Central Railway Company.

Comment: With minor exceptions this finding is correct, but it is incomplete in that, among other things, it does not show that the 1922 lease to The Chicago River and Indiana Railroad Company of the railroad properties and the acquisition of the stock of the River Road by the New York Central were specifically authorized and approved by the Interstate Commerce Commission, nor does it show other perti-

nent provisions of the 1922 lease and facts pertaining thereto. Plaintiff therefore requests that the said finding of the Court be changed to read as set forth below:

Plaintiff's Requested Finding No. 4: Plaintiff also constructed three hundred miles of railroad track consisting of main lines connecting with truck lines entering Chicago and switches to various industries located adjacent to its tracks. Plaintiff leased its railway property in 1897. Prior thereto it had permitted individual trunk-line railroads to transport livestock, with their own engines and crews, over its railroad tracks to and from the Union Stock Yards. Its 1897 lease was to Chicago & Indiana State Line Railway [fol. 209] Company. It retained for itself the loading and unloading platforms, chutes, pens, and other facilities in its stockyard. In 1898 the lessee consolidated with another company, and the consolidated company became known as Chicago Junction Railway Company, an Illinois railroad corporation. The trunk-line railroads entering the City of Chicago acquired trackage rights for the handling of livestock with their own power and crews over said railroad of said Chicago & Indiana State Line Railway Company and said Chicago Junction Railway Company. On December 1, 1913, the aforesaid lease of 1897 was cancelled, and plaintiff granted, demised and leased all the railroad properties then owned by it to said Chicago Junction Railway Company in perpetuity, at a rental of $600,000 per year, by an indenture containing no defeasance clause or other provision giving plaintiff the right to recover possession of said properties (Exs. 1 and 3).

On May 19, 1922, said Chicago Junction Railway Company leased all its railroad properties, including all the properties granted, demised and leased to it in perpetuity by the plaintiff, to The Chicago River and Indiana Railroad Company (a railroad corporation organized under the general railroad incorporation act of the State of Illinois in the year 1904) for a term of ninety-nine years and thereafter, at the election of the lessee, in perpetuity; and at the same time all the capital stock of The Chicago River and Indiana Railroad Company was acquired by The New York Central Railroad Company. Upon the execution of said lease of May 19, 1922, said Chicago Junction Railway Company cancelled its tariffs and ceased doing business as a common carrier. The making of said lease and the acquisition of

said capital stock were approved and authorized by an order of the Interstate Commerce Commission made and [fol. 210] entered on May 16, 1922 in a proceeding known as Chicago Junction Case, 71 I. C. C. 631. Plaintiff was a party to said lease, and by a covenant therein contained consented to and ratified it. The properties covered by said lease were demised to The Chicago River and Indiana Railroad Company "with the right, power and authority in the River Company [i. e., The Chicago River and Indiana Railroad Company] * * * thereon to pursue the business of a common carrier." The lease further gave The Chicago River and Indiana Railroad Company "the right to conduct, operate and manage * * * the premises and properties by this instrument demised." In said lease The Chicago River and Indiana Railroad Company covenanted and agreed "to assume and to promptly and fully perform, during the term hereof * * * all obligations * * * imposed on either of said corporations [i. e., plaintiff or Chicago Junction Railway Company] or the owner from time to time of any of the properties hereby demised, by any present or future laws of the United States or of the State of Illinois or by any ordinance or regulation, present or future, of the City of Chicago, or other public body, affecting or relating to said properties, and that with respect to said properties it will promptly and fully perform and comply with all such laws, ordinances and regulations." (Tr. 17-19, 23, 124, 325; Exs. 1 and 3 and report and order in Chicago Junction Case included as part of Ex. A in this Court.)

The properties of the plaintiff granted, demised and leased by it in perpetuity to said Chicago Junction Railway Company, as aforesaid, did not include plaintiff's platforms, chutes and pens used in the loading and unloading of carload shipments of livestock for the trunk-line railroads. Since May 19, 1922 all railroad properties formerly owned, possessed or operated by plaintiff and all railroad prop- [fol. 211] erties previously owned, leased, possessed or operated by said Chicago Junction Railway Company have been, and now are, operated by The Chicago River and Indiana Railroad Company as a common carrier by rail for hire as a part of the system of railroads commonly known as the New York Central System (Tr. 9-16; Ex. 1).

Court's Finding No. 6

6. The court finds that the only question in issue is the jurisdiction of the Interstate Commerce Commission to make the order which the plaintiff here seeks to set aside. Plaintiff does not question the sufficiency of the evidence to support the finding, nor does it question the sufficiency of the findings to support the order. It denies that the Interstate Commerce Commission had jurisdiction of the subject matter or authority to enter the order complained of.

Comment: There are two questions involved in this proceeding: (1) whether plaintiff is a common carrier subject to the provisions of the Interstate Commerce Act, and (2) whether the Commission entered its order without according plaintiff the full hearing required by Section 15(7) of the Interstate Commerce Act. If the first question is answered in the negative the Commission had no power to enter the order assailed in this case, and its order should be set aside. Likewise, if plaintiff was not given the full hearing required by statute the order of the Commission should be set aside.

In Section 14 of its bill of complaint, in its brief filed with this Court at the beginning of the oral argument, and again in the course of the oral argument, plaintiff did question the sufficiency of the evidence to support the findings of the [fol. 212] Commission and the sufficiency of the findings to support the order. Plaintiff's principal contention, however, is that the conclusions of law reached by the Commission to the effect that plaintiff is a common carrier subject to its jurisdiction and that plaintiff was accorded a full hearing are erroneous, even on the facts found by the Commission.

This finding should be eliminated, or a finding in the language of Section 14 of plaintiff's bill of complaint adopted.

Court's Finding No. 7

7. The court further finds that jurisdiction was denied by plaintiff because plaintiff is not a common carrier and was not, at the time said order was entered. It also denies that the services for which charges covered by the order were made, were interstate transportation services.

Comment: The first sentence is substantially correct, although a more accurate statement would be that plaintiff

denies that the commission has jurisdiction over it because it is not a common carrier by railroad or otherwise. The second sentence should be qualified. Plaintiff does not deny that the services of loading and unloading livestock at the Union Stock Yards in Chicago are transportation services which the Interstate Commerce Act requires the common carrier publishing the rate paid by the shipper to furnish. Since these services are inherently stockyard rather than railroad services, and since it is not a common carrier subject to the provisions of the Interstate Commerce Act, plaintiff denies that the services of loading and unloading are interstate transportation services as far as it is concerned, and contends they are stockyard services within the pur- [fol. 213] view of the Packers and Stockyards Act, 1921. Stated in another way, the loading and unloading services performed by plaintiff with respect to interstate shipments are interstate transportation services as between the shipper of livestock and the railroads because they are specifically made so by the provisions of the Interstate Commerce Act, but as between the railroads and the plaintiff the services are stockyard services rendered by plaintiff as agent for the railroads and as part of its calling of operating a public stockyard. In performing these services plaintiff uses only stockyard facilities. It has not become a common carrier by railroad because it performs them for the railroads.

If the court feels that a finding should be made concerning plaintiff's contentions, the finding should conform to these comments.

Court's Finding No. 8

8. Plaintiff is and was at the time of the hearing by the Interstate Commerce Commission, and when the Interstate Commerce Commission made its order, a common carrier within the meaning of the Interstate Commerce Act.

Comment: This is one of the ultimate questions involved in the case and is erroneously decided. In reaching the legal conclusion that plaintiff is a common carrier within the meaning of the Interstate Commerce Act, the court errs in that it either assumes, contrary to the evidence, that plaintiff is a common carrier by railroad, or misconstrues the act to include plaintiff, even though it is neither a railroad nor a common carrier. If it is decided that some such

finding should be included in the findings of fact, the court's [fol. 214] findings should be amended by changing the words "is and was" to "is not and was not."

Court's Finding No. 9

9. The court finds that the services covered by the order of the Commission which are complained of, were interstate transportation services within the meaning of the Interstate Commerce Act.

Comment: See comment in connection with Court's finding No. 7. The Court's finding No. 9 should either be eliminated or the following finding substituted for it.

Plaintiff's Requested Finding No. 9: Loading and unloading of livestock at plaintiff's Union Stock Yards in the City of Chicago and the furnishing of the facilities therefor are part of the interstate transportation by railroad of livestock to and from said yards in the sense that the trunk-line railroads under the law must furnish such services and facilities as a part of their obligation to the shipper. The services of loading and unloading livestock at plaintiff's stockyard (irrespective of the legal aspect thereof) are in their nature stockyard and not railroad services. The trunk-line railroads hire plaintiff to perform these services for them and to furnish the necessary facilities. (Tr. 39, 101-105; Ex. 1.)

Court's Finding No. 10

10. The court finds that the shipment of livestock from points of origin to the Union Stock Yards requires the common carrier to unload the stock from the cars and deliver them into the pens of the Union Stock Yards.

Comment: Section 15(5) of the Interstate Commerce Act requires the trunk-line carrier publishing rates on livestock [fol. 215] consigned to Union Stock Yards at Chicago to furnish the service of unloading stock from the cars into suitable pens at the Union Stock Yards without extra charge therefor to the shipper, consignee or owner. This does not mean, however, that the railroads cannot employ the plaintiff to perform this service for them; in fact, that is what they do. (Tr. 39, 41.)

This is not a finding of fact but a conclusion of law. Moreover, it is an erroneous conclusion of law, and should be eliminated.

Court's Finding No. 11

11. The court finds that the unloading of the stock and driving of them to the pens in the Stock Yards constitute interstate transportation services which are subject to the regulation of the Interstate Commerce Commission.

Comment: This finding is improper for the reason that by the terms of the Interstate Commerce Act the jurisdiction of the Commission is made to depend, not upon the character of the service, but upon the character of the agency by which the service in question is rendered. That is, even though the loading and unloading of livestock at public stockyards from or into suitable pens is by definition in the act included in transportation, the agency by which such service is rendered is not subject to the jurisdiction of the Interstate Commerce Commission, unless such agency is a common carrier by railroad.

Plaintiff's Requested Finding No. 11: The Court finds that the unloading of interstate shipments of livestock from railroad cars into suitable pens at the Union Stock Yards, Chicago, is an interstate transportation service which the Interstate Commerce Act requires the common carriers by [fol. 216] railroad transporting livestock in interstate commerce to the Union Stock Yards to furnish, and that the Interstate Commerce Commission has power to regulate such service only by orders directed to the said carriers.

Court's Finding No. 12

12. The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff.

Comment: In view of the fact that plaintiff owns the unloading facilities and insists on performing the unloading service, this finding is substantially correct. It is incomplete, however, and the finding hereafter requested should be made.

Plaintiff's Requested Finding No. 12: Since shortly after plaintiff started business in 1865 it has performed, and still performs, for the trunk-line railroads, as their agent, the said services of loading and unloading carload shipments of livestock consigned by rail from and to its said stockyard, and (except for a short period when a portion thereof was paid by shippers) its charges for said services have been

paid to it, and are now paid to it, by the trunk-line railroads transporting such shipments to and from said stockyard. Shipments of livestock consigned from and to consignors and consignees at said stockyard by rail must be loaded and unloaded by means of plaintiff's platforms, chutes and pens. Plaintiff does not furnish any vehicle or any motive power for, nor in any way carry, the livestock which it unloads or loads for said railroads, but drives such livestock from the railroad cars into suitable pens owned by plaintiff or from pens owned by plaintiff into the [fol. 217] railroad cars. Under plaintiff's rules the said services of loading and unloading are not permitted to be performed by any persons not employed by the plaintiff. Plaintiff insists upon performing these services (a) because they are inherently stockyard services and are performed on the premises of plaintiff; (b) because the work of loading and unloading requires men long trained in the handling of all kinds of livestock, and plaintiff has and the railroads do not have such personnel; (c) because livestock, which is a perishable commodity, must be unloaded immediately in order to prevent congestion and delay, and the railroads as a practical matter could not perform the service efficiently; (d) because divided responsibility would result in an interference with the even and efficient flow of traffic essential to the successful operation of a livestock market; (e) because plaintiff could not properly serve its non-railroad patrons if it permitted the railroads to perform the loading and unloading; and (f) because of other practical objections, such as wage scales and working conditions, which would make it inadvisable for plaintiff to permit the railroads to do the work on its property. (Tr. 39-41, 49, 101-105; Ex. 1.)

Additional Findings Requested by Plaintiff

Plaintiff requests that the Court make the following additional findings of fact:

1. At all times since the construction of the Union Stock Yards, and now, plaintiff has owned, maintained and exclusively operated loading and unloading platforms, chutes and pens whereby livestock transported by railroad in interstate and Illinois intrastate commerce and consigned by or to persons at the Union Stock Yards is loaded into or un-

loaded from railroad cars in which it is transported. (See sec. 3 of bill of complaint and answers thereto.)

[fol. 218] 2. The trunk-line railroads in their tariffs on file with the Interstate Commerce Commission and Illinois Commerce Commission provide that they will transport inbound carload shipments of livestock to pens in plaintiff's stockyard and transport outbound carload shipments of livestock from pens in plaintiff's stockyard, and in said tariffs the said trunk-line railroads also provide that they will pay plaintiff its charges for unloading inbound carload shipments of livestock from the railroad cars into suitable pens and its charges for loading outbound carload shipments of livestock from said pens into the railroad cars. The term "suitable pens" is defined in said tariffs as meaning "the pen into or from which livestock is loaded, unloaded or reloaded directly from or to the car." Plaintiff is listed in said tariffs as an industry operating a stockyard, and its stockyard is shown in said tariffs as a station on the line of Chicago Junction Railway, which is a trade name used by The Chicago River and Indiana Railroad Company in operating the properties covered by the aforesaid lease of May 19, 1922. Plaintiff does not have, and is not a participating carrier in, any tariff on file with the Interstate Commerce Commission naming rates or charges for the transportation of persons or property from place to place. The only tariff which plaintiff has on file with the Interstate Commerce Commission is a tariff stating its charges for performing, as a carrier's agent, the services of loading and unloading livestock at its stockyard in the City of Chicago. Plaintiff has no tariffs on file with the Illinois Commerce Commission, the tribunal charged with the regulation of intrastate rates of common carriers by railroad in the State of Illinois, and has never been required by said Commission to file tariffs of any kind or character. Inbound carloads of livestock [fol. 219] consigned to consignees at said stockyard by rail are transported by the various trunk-line railroads serving the City of Chicago with their own engines and crews to the unloading platforms and chutes of plaintiff, where plaintiff unloads such livestock for said railroads from the railroad cars into suitable pens in said stockyard owned by plaintiff. Outbound carload consignments of livestock shipped by rail are loaded by plaintiff for said trunk-line railroads from its pens in said stockyard into railroad cars furnished and

placed for loading by said railroads adjacent to plaintiff's platforms and chutes, and are thereafter transported from said platforms by the said railroads with their own engines and crews. The trains of said railroads do not come upon the property of plaintiff, and plaintiff exercises no control over them. Said railroads employ plaintiff to perform the loading and unloading services for them and pay plaintiff its charges therefor (Tr. 25, 39, 41, 116, 306, 352 et seq.; Exs. 1, 7 and 24).

3. Plaintiff owns, conducts and operates its said stockyard in the City of Chicago, and furnishes at said stockyard services and facilities in connection with the receiving, buying, selling, marketing, feeding, watering, holding delivery, shipment, weighing and handling of livestock transported by railroad trains and motor vehicles to and from said stockyard, including the services of loading and unloading livestock for the trunk-line railroads. Said stockyard is approximately one mile in length and one-half mile in width, and plaintiff maintains and operates therein numerous pens, driveways, buildings, scales and other facilities used and useful in the operation of said stockyard, including platforms, chutes and pens which are used for unloading livestock from railroad cars and motor vehicles following the inbound movement of such livestock and for loading live-[fol. 220] stock into railroad cars and motor vehicles for outbound movement. Livestock is transported to and from said stockyard by the trunk-line common carriers by railroad which serve said City of Chicago, and also by motor vehicles. (See sec. 2 of bill of complaint and answers thereto; also see Tr. 6, 8, 45-49, 569-606.)

4. At the hearing before the Examiner of the Interstate Commerce Commission in the City of Chicago plaintiff sought and attempted to introduce evidence to show the matters and things alleged in section 10 of its bill of complaint, but the Examiner presiding at said hearing refused to receive such evidence or any evidence pertaining to public stockyards other than plaintiff's stockyard. The only objection offered by any party to the admission of such evidence was on the ground that it was irrelevant and immaterial. The said Examiner refused to permit plaintiff to ask questions of its witness designed to bring out such evidence; refused to permit plaintiff to show the qualifications of said witness to testify with respect to such evidence; refused to

permit plaintiff to have exhibits containing such evidence marked for identification by the reporter of said Commission; and refused to allow plaintiff to make specific offers of proof of such evidence. On or about September 8, 1937, plaintiff filed with the Interstate Commerce Commission a petition for further hearing before final submission, in which it briefly stated the nature and purpose of the evidence which it wished to adduce (to wit, the evidence described in section 10 of the bill of complaint filed herein) and which the said Examiner had refused to receive, and set forth the aforesaid refusals of the Examiner; and in said petition plaintiff prayed that said proceeding before said Commission be set for further hearing, that the Examiner assigned to hear the [fol. 221] proceeding be instructed to receive the evidence rejected at said hearing in the City of Chicago or such part thereof as the Commission might deem material and relevant, that in any event that plaintiff be given an opportunity at a further hearing before final submission to make offers of proof of specific facts in respect of any such evidence not received or deemed immaterial or irrelevant by the said Commission, including the opportunity to have exhibits marked for identification and to offer them in evidence, and that the said Commission grant such further relief in the premises as might be meet. Plaintiff was unable in said petition to set forth specifically the evidence which it wished to offer because the rules of practice of the said Commission provided that "If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative." The said Commission by an order entered on November 8, 1937 denied said petition for further hearing before final submission. (See sec. 10 of bill of complaint and the answers thereto; also see plaintiff's petition for further hearing before final submission, which is part of Ex. A in this Court.)

Comment: In this requested finding plaintiff, in the interest of brevity, has made reference to section 10 of its bill of complaint. If the Court feels that the incorporation of a part of the bill of complaint by reference is objectionable, the first two paragraphs of section 10 of the bill should be set out in haec verba.

5. Plaintiff does not possess, operate or control in any way, either directly or indirectly, any railroad or part thereof or any cars, locomotives or other railroad rolling [fol. 222] stock or other railroad facilities; it does not transport, nor hold itself out to transport, persons or property from place to place by rail or otherwise; it is not, either directly or indirectly, associated with, or controlled by, or in the control of, or affiliated with, any common carrier by railroad or any person, firm or corporation owning, controlling or operating any common carrier by railroad; it does not, directly or indirectly, have any interest in, nor share in the profits of, any common carrier by railroad; it does not issue and is not a party to bills of lading or waybills; it is not treated as a common carrier by the railroads serving its stockyard; and it does not perform, nor hold itself out to perform, any services or acts as a common carrier by railroad or otherwise. (Tr. 14, 23-25, 125, 217-218, 229-230, 275-305, 282-283, 302.)

Comment: The clause "it is not treated as a common carrier by the railroads serving its stockyard" is a conclusion of fact incorporated in this finding in order to shorten it. If the Court feels that the evidentiary facts rather than the conclusion should be set forth, plaintiff requests that the facts set forth in the lettered paragraphs in the appendix to this motion be set out in this finding.

Plaintiff's Requested Conclusions of Law

For reasons previously advanced by plaintiff at oral argument and its brief filed at that time plaintiff believes the conclusions of law made by the Court to be erroneous. It requests that the Court make the following conclusions of law and amend its decree accordingly:

1. The order of the Interstate Commerce Commission herein assailed is invalid, null and void because under the evidence of record in the proceeding before the Interstate [fol. 223] Commerce Commission in I. & S. Docket No. 4296 plaintiff is not a common carrier.

2. Said order is invalid, null and void because under the evidence of record in the said proceeding before the Interstate Commerce Commission plaintiff is not a common carrier by railroad.

3. Said order is invalid, null and void because plaintiff is not a common carrier subject to the provisions of the Interstate Commerce Act.

4. Said order is invalid, null and void because plaintiff is not a common carrier by railroad subject to the provisions of the Interstate Commerce Act.

5. Said order is invalid, null and void because there is no law which requires plaintiff to maintain on file with the Interstate Commerce Commission any tariff stating the charges made by plaintiff for the services of loading or unloading carload shipments of livestock at its stockyard in the City of Chicago.

6. Said order is invalid, null and void because the Interstate Commerce Commission in said proceeding failed and refused to receive competent, relevant and material evidence proffered by plaintiff, and failed and refused to permit the plaintiff to qualify its witness, or have exhibits marked for identification, or make specific offers of proof with respect to competent, relevant and material evidence.

7. Said order is invalid, null and void because it was made and entered by the Interstate Commerce Commission without according to plaintiff, although duly demanded by the plaintiff, a full hearing as required by paragraph 7 of Section 15 of the Interstate Commerce Act.

[fol. 224] Exceptions

In its findings of fact and conclusions of law entered on March 9, 1939, the Court said: "Either side may have ten days within which to file exceptions to these findings and conclusions." Accordingly, plaintiff excepts to Findings of Fact Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12. Plaintiff also excepts to each and every one of the conclusions of law entered by the Court and excepts to the final decree entered herein.

Plaintiff also excepts to the Court's failure to make the findings of fact and conclusions of law set forth in plaintiff's comments respecting and suggested modifications of defendants' proposed findings of fact filed on March 2, 1939.

Respectfully submitted, Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Thomas T. Cooke, Bryce L. Hamilton, Solicitors for Plaintiff. Address for Service: 1400 First National Bank Bldg., Chicago, Illinois.

March 20, 1939.

[fol. 225] Appendix

Witness Heinemann pointed out that plaintiff is treated differently from common carriers by railroad. While individually some of these facts may not seem important, collectively they show that the railroads have in fact recognized that plaintiff is engaged in a calling which is entirely different from their own. Summarized, these differences are:

(a) The railroads have never entered into joint through rates with plaintiff, except in the instance of a single carrier, which rates never became effective because the Interstate Commerce Commission would not permit it. If plaintiff were a common carrier, it would be the duty of the railroads under section 1(4) of the Interstate Commerce Act to establish joint through rates with plaintiff.

(b) The railroads do not deliver possession of cars of live stock to plaintiff as they do in the case of connecting or switching carriers. The railroads, with their own engines and crews, move trains, both loaded and empty, to and from the platforms of plaintiff. These trains do not come upon the property of plaintiff, and it exercises no control over them.

(c) Plaintiff is a large purchaser of grain and hay, which is shipped to it by rail. It is not a party to the rates on these commodities, but pays the full rate and is treated in the same manner as any commercial receiver of freight. It is well known that in connection with company material practically all railroad companies, by purchasing the commodity for shipment to a destination on their line and ren-
[fol. 226] dering some service in connection with it, pay something less than the full freight rate through the medium of divisions. Marquette Coal Co. v. Pennsylvania R. R. Co., 40 I. C. C. 4; Tuckerton R. R. Co. v. Pennsylvania R. R. Co., 52 I. C. C. 319.

(d) Freight bills on consignments to plaintiff are rendered to it by the railroads and paid in the same manner which is followed in the case of an ordinary industry, instead of by handling on interline accounts as is customary between common carriers.

(e) Plaintiff is not a party to the per diem agreement between railroads; instead it is assessed demurrage on its

shipments under an average agreement, and is treated in the same manner as any other large industry would be treated.

(f) Plaintiff is not a member of and has never been invited to become a member of any of the railroad associations.

(g) Plaintiff is not invited to conferences with carriers respecting rates, charges, rules or regulations affecting the transportation of livestock, although it has a very great interest in such matters.

(h) Plaintiff's officers are not given free transportation as is customary between railroads.

(i) The railroads compute all freight and other transportation charges on livestock moving to and from plaintiff's yards. Plaintiff has become a collecting agent of the railroads for inbound charges, except on shipments consigned to the packers, merely because it is more convenient to the railroads for plaintiff to collect these charges in connection with its own charges than it is for the railroads to do that work themselves. The charges so collected are not handled on interline accounts, as is customary between railroads, [fol. 227] and plaintiff is required to put up a bond to secure their payment, a thing unheard of in the ordinary relations between railroads. In collecting the charges due it from the railroads for loading and unloading services, plaintiff does not deduct them from moneys which it has collected for the railroads, but renders separate bills which are paid monthly.

(j) Plaintiff does not collect undercharges on freight shipments, nor does it handle or have anything to do with overcharge claims on such shipments.

(k) While plaintiff furnishes information to the railroads concerning dead and crippled animals and also furnishes weights to the railroads, the latter have their own representative, the Western Weighing & Inspection Bureau, make investigations, keep records and hold post-mortem examinations of dead animals, keep a close watch on weights furnished, make their own classification of animals and otherwise in these respects conduct themselves toward the plaintiff just as they would in any other case where a non-carrier agent was performing certain services for them.

The Central Inspection & Weighing Bureau renders similar but less extensive services for the railroads in connection with outbound shipments to the east.

(l) Plaintiff and the railroads do not use the same classification of animals. For instance the stockyard classification of calves is based on weight, while the classification of the railroads is based on age. Plaintiff has never been invited to conform its classifications to those of the railroads.

(m) Neither waybills nor shipping orders are ever prepared by plaintiff. This work is performed by the railroads directly or through the railroads' joint agency at the Union Stock Yards.

[fol. 228] (n) Plaintiff is not called upon to quote freight rates or to handle ordinary railroad traffic matters, to validate or arrange for drovers' return transportation or similar railroad matters. This work is done either by the railroads' joint agency or individual representatives of the railroads.

(o) Plaintiff is not a member of the Western Weighing & Inspection Bureau, the Central Inspection & Weighing Bureau, or the joint stockyard railroad agency, and has never been invited to become such a member.

(p) Plaintiff is never asked to confer with the railroads on questions of policy, nor has it ever been invited, notwithstanding its interest in livestock rates, to become a member of any of the rate committees of the railroads.

(q) Plaintiff has its own accounting system, which is wholly independent of the railroads' accounting systems, and is not a subscriber to the accounting rules or practices of the railroads.

(r) Claims for injury to or loss of stock in transit are handled by the line-haul carriers and not by plaintiff, although plaintiff may be asked to furnish the trunk lines with such information as it may possess concerning the animals involved.

(s) Plaintiff is not a member of the freight claim association of the railroads nor a party to its rules.

(t) Plaintiff is not allowed a division of freight rates, and is not a party to any tariff arrangement on transit stock;

instead, the railroads pay it for its services the charges which it has on file with the Secretary of Agriculture.

(u) Plaintiff issues no bills of lading or switching tickets, [fol. 229] and its name does not appear on bills of lading or waybills as a participating carrier.

(v) Plaintiff is not asked to participate in cases involving livestock or other rates.

(w) Plaintiff is not now nor has it ever been a participating carrier in any of the tariffs of the railroads. Exhibit 24 contains photostatic copies of the more important tariff schedules and shows the methods employed by the railroads in the publication of rates to and from plaintiff's stockyard. Agent R. A. Sperry's I. C. C. 329 (a tariff of the railroads serving Chicago) is a directory of industries in the Chicago district, and plaintiff is listed therein at page 100 as an industry operating a stockyard. Agent R. A. Sperry's I. C. C. 339 (also a tariff of the railroads serving Chicago) contains the charges, rules and regulations on traffic to and from points within the Chicago district, and rate basis 6 shown on page 9 of supplement 13 sets out the basis for rates to and from plaintiff's stockyard. On page 6 of the original tariff plaintiff's yard is listed as a "Station" on the Junction. The application of this tariff makes the Chicago rates apply to and from plaintiff's stockyard subject in some instances to certain "plus" charges.

Tariffs of line-haul carriers included in Exhibit 24 provide for the application of rates to and from plaintiff's stockyard, generally by (1) specific cross-reference to Agent Sperry's I. C. C. 339, as providing for charges to and from plaintiff's stockyard (e. g., Alton I. C. C. 56), or (2) by specific schedules in the line-haul tariffs providing for rates on shipments to and from plaintiff's stockyard as distinguished from the stockyards operated by the railroads in the Chicago district (e. g., A. T. & S. F. Ry., I. C. C. 12423).

The net effect of each of these methods used is to provide [fols. 230-234] for through rates on livestock between plaintiff's stockyard and all points in the United States. In no tariff is plaintiff listed as a concurring carrier. In every case its stockyard is indicated directly or through cross-reference as a point to and from which through shipments may be moved at the established rates by the railroads concurring in said tariffs. (Tr. 275-424; Exs. 23 and 24)

[fols. 235-239] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTIONS FOR MODIFICATION OF FINDINGS, ETC.—April 5, 1939

The Court having fully considered the motions of plaintiff and of defendants for modification of its findings of fact and conclusions of law and the briefs relating thereto and being fully advised in the premises:

It is Ordered, That said motions be and the same are hereby denied.

Enter:

Evan A. Evans, Circuit Judge; Charles E. Woodward, District Judge; M. L. Igoe, District Judge.

Dated April 5th, 1939.

[fols. 240-241] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed April 7, 1939

To The Honorable Evan A. Evans, United States Circuit Judge, The Honorable Charles E. Woodward, and The Honorable Michael L. Igoe, United States District Judges:

Now comes The Union Stock Yard and Transit Company of Chicago, plaintiff herein, by its solicitors, and feeling aggrieved by the final decree of the District Court made and entered herein on, to-wit, March 9, 1939, does hereby appeal therefrom to the Supreme Court of the United States and prays that its appeal be allowed and that citation be issued. The particulars wherein plaintiff considers the said final decree erroneous are set forth in its assignment of errors filed herewith.

Plaintiff further prays that its original exhibits and a transcript of the other parts of the record, proceedings and papers on which the said final decree was made and entered, duly authenticated, may be transmitted to the Supreme

Court of the United States and that an order be entered fixing the amount of bond and the security to be given by it.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Bryce L. Hamilton, Solicitors for Plaintiff, The Union Stock Yard and Transit Company of Chicago. Address for service: 1400 First National Bank Bldg., Chicago, Illinois.

Dated April 7, 1939.

[fol. 242] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 7, 1939

Now comes The Union Stock Yard and Transit Company of Chicago, plaintiff herein, and presents with its petition for appeal the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final decree entered herein by the District Court on, to-wit, March 9, 1939.

The District Court of the United States for the Northern District of Illinois, Eastern Division, erred in the following respects:

1. In holding that the bill of complaint should be dismissed.

2. In dismissing the bill of complaint.

3. In failing and refusing to hold that the order of the Interstate Commerce Commission complained of in this proceeding is invalid, null and void and beyond the power of the said Commission to enter.

4. In failing and refusing to set aside the said order of the Interstate Commerce Commission, to enjoin the enforcement thereof, and otherwise to grant the relief requested by plaintiff in its bill of complaint.

[fol. 243] 5. In holding that the Interstate Commerce Commission had jurisdiction to enter the order complained of.

6. In holding that plaintiff is a common carrier and subject to the regulation of the Interstate Commerce Commission.

7. In holding that plaintiff is engaged in the transportation by railroad of livestock in interstate commerce, and that the services it renders in unloading livestock from cars and delivering such livestock to the pens in its stockyard are interstate transportation services and subject to the regulation and control of the Interstate Commerce Commission.

8. In holding that the order which the plaintiff complains of is a lawful and valid order of the Interstate Commerce Commission and within the jurisdiction conferred upon the said Commission by the Interstate Commerce Act.

9. In holding that the defendants should recover their taxable costs.

10. In ordering that the defendants should recover from the plaintiff their taxable costs and disbursements.

11. In failing and refusing to hold that plaintiff is not a common carrier by railroad or otherwise.

12. In failing and refusing to hold that plaintiff is not a common carrier subject to the provisions of section 6 or other provisions of the Interstate Commerce Act.

13. In failing and refusing to hold that the said order of the Interstate Commerce Commission is invalid, null and void, because there is no law which requires plaintiff to maintain on file with the Interstate Commerce Commission any tariff stating the charges made by plaintiff for [fol. 244] the services of loading or unloading carload shipments of livestock at its stockyard in the City of Chicago.

14. In failing and refusing to hold that the Interstate Commerce Commission and its examiner erroneously and arbitrarily refused to receive competent, relevant and material evidence proffered by plaintiff to show that the Interstate Commerce Commission and public stockyards throughout the United States and the railroads serving such public stockyards have for many years by practical construction interpreted the Interstate Commerce Act as not applicable to stockyard companies which load and unload livestock for the railroads where the circumstances and conditions are

similar to those obtaining with respect to plaintiff and the operation of its stockyard in the City of Chicago.

15. In failing and refusing to hold that the Interstate Commerce Commission and its examiner erroneously and arbitrarily refused to receive competent, relevant and material evidence of any character pertaining to public stockyards other than plaintiff's stockyard which was proffered by plaintiff, and is more particularly described in section 10 of plaintiff's bill of complaint.

16. In failing and refusing to hold that the Interstate Commerce Commission and its examiner erroneously and arbitrarily refused to receive competent, relevant and material evidence proffered by plaintiff to show that in situations analogous to that obtaining at plaintiff's stockyard with respect to loading and unloading livestock for railroads (such as the handling of cotton for railroads at transit [fol. 245] points, the handling of freight for railroads by lighterage companies and dock companies at ship-side, and pick-up and delivery services performed by motor truckers for railroads) the Interstate Commerce Commission has never required the person or persons performing such services for the railroads to file tariffs with it.

17. In failing and refusing to hold that the Interstate Commerce Commission and its examiner erroneously and arbitrarily refused to permit plaintiff to qualify its witness to give the evidence referred to in the foregoing assignments of error Nos. 14, 15 and 16, to permit plaintiff to ask questions of its witness designed to bring out such evidence, to permit plaintiff to have exhibits containing such evidence marked for identification by the reporter of said Commission and to permit plaintiff to make specific offers of proof of such evidence.

18. In failing and refusing to hold that the said order of the Interstate Commerce Commission is invalid, null and void, because it was made and entered by said Commission without according to plaintiff, although duly demanded by plaintiff, a full hearing as required by paragraph 7 of section 15 of the Interstate Commerce Act.

19. In failing and refusing to hold that the said order of the Interstate Commerce Commission is invalid, null and void, because it was made and entered by said Com-

mission without according to plaintiff, although duly demanded by plaintiff, the full and fair hearing to which it was entitled under and by reason of the Fifth Amendment to the Constitution of the United States.

[fol. 246] 20. In finding that plaintiff constructed trunk lines entering Chicago.

21. In finding that the only question in issue in this cause is the jurisdiction of the Interstate Commerce Commission to make the order which the plaintiff seeks to set aside.

22. In finding that plaintiff does not question the sufficiency of the evidence to support the finding of the Interstate Commerce Commission or the sufficiency of the findings of said Commission to support its said order.

23. In finding that plaintiff is and was at the time of the hearing by the Interstate Commerce Commission and when the said Commission made its said order a common carrier within the meaning of the Interstate Commerce Act.

24. In finding, without qualification as to application to plaintiff, that the services covered by the said order of the Interstate Commerce Commission were interstate transportation services within the meaning of the Interstate Commerce Act.

25. In finding, without qualifications as to application to plaintiff, that the unloading of the stock and the driving of them to pens in plaintiff's stockyard constitute interstate transportation services which are subject to the regulation of the Interstate Commerce Commission.

26. In failing and refusing to make each and every of the findings of fact requested by plaintiff in its motion filed March 20, 1939 pursuant to rule 52(b) of the Federal Rules of Civil Procedure, namely:

[fol. 247] (1) Plaintiff, The Union Stock Yard and Transit Company of Chicago, was incorporated in the year 1865 by a special act of the Legislature of the State of Illinois. It was authorized by said act to construct and operate a general union stockyard for livestock, to construct and operate a hotel for the accommodation of the public doing business at the yards, to construct a railway to connect its stockyard with the tracks of railroads terminating in Chicago, and to

operate said railway. By said act plaintiff was given the power to take land "for the purpose of constructing said railroad track (but for no other purpose) * * * in the manner provided for in the 'Act to amend the law condemning the right of way for purposes of internal improvement,' approved June 22, A. D. 1852, and the acts amendatory thereof, * * *." Said act also provides that for the care, subsistence and handling of livestock plaintiff "may take and require to be paid, such reasonable charges as may be deemed just and proper."

(2) Upon receiving its charter plaintiff acquired approximately half a section of land in what is now a part of the City of Chicago, Illinois, and constructed thereon a large stockyard known as Union Stock Yards, which was opened for business in 1865, and has since that time been operated by plaintiff as a public stockyard, and since 1921 has been duly designated as a stockyard subject to the provisions of the Packers and Stockyards Act, 1921. (7 U. S. Code, secs. 201-229.) Pursuant to the requirements of said act plaintiff, since December 30, 1921, has had on file, and still has on file, with the Secretary of Agriculture schedules stating its rates and charges for various stockyard services as defined in Section 301 of said act (7 U. S. Code, sec. 201) furnished by plaintiff at its said stockyard, except the services of loading and unloading livestock for railroads.

(3) Plaintiff also constructed three hundred miles of railroad track consisting of main lines connecting with trunk lines entering Chicago and switches to various industries located adjacent to its tracks. Plaintiff leased its railway property in 1897. Prior thereto it had permitted individual trunk-line railroads to transport livestock with their own engines and crews, over its railroad tracks to and from the Union Stock Yards. Its 1897 lease was to Chicago & Indiana State Line Railway Company. It retained for itself the loading and unloading platforms, chutes, pens, and other facilities in its stockyard. In 1898 the lessee consolidated with another company, and the consolidated company became known as Chicago Junction Railway Company, an Illinois railroad corporation. The trunk-line railroads entering the City of Chicago acquired trackage rights for the handling of livestock with their own power and crews over said railroad of said Chicago & Indiana State Line Railway [fol. 248] Company and said Chicago Junction Railway

Company. On December 1, 1913, the aforesaid lease of 1897 was cancelled, and plaintiff granted, demised and leased all the railroad properties then owned by it to said Chicago Junction Railway Company in perpetuity, at a rental of $600,000 per year, by an indenture containing no defeasance clause or other provision giving plaintiff the right to recover possession of said properties.

(4) On May 19, 1922, said Chicago Junction Railway Company leased all its railroad properties, including all the properties granted, demised and leased to it in perpetuity by the plaintiff, to The Chicago River and Indiana Railroad Company (a railroad corporation organized under the general railroad incorporation act of the State of Illinois in the year 1904) for a term of ninety-nine years and thereafter, at the election of the lessee, in perpetuity; and at the same time all the capital stock of The Chicago River and Indiana Railroad Company was acquired by The New York Central Railroad Company. Upon the execution of said lease of May 19, 1922, said Chicago Junction Railway Company cancelled its tariffs and ceased doing business as a common carrier. The making of said lease and the acquisition of said capital stock were approved and authorized by an order of the Interstate Commerce Commission made and entered on May 16, 1922 in a proceeding known as Chicago Juction Case, 71 I. C. C. 631. Plaintiff was a party to said lease, and by a covenant therein contained consented to and ratified it. The properties covered by said lease were demised to The Chicago River and Indiana Railroad Company "with the right, power and authority in the River Company (i. e., The Chicago River and Indiana Railroad Company) * * * thereon to pursue the business of a common carrier." The lease further gave The Chicago River and Indiana Railroad Company "the right to conduct, operate and manage * * * the premises and properties by this instrument demised." In said lease The Chicago River and Indiana Railroad Company covenanted and agreed "to assume and to promptly and fully perform, during the term hereof * * * all obligations * * * imposed on either of said corporations (i. e., plaintiff or Chicago Junction Railway Company) or the owner from time to time of any of the properties hereby demised, by any present or future laws of the United States or of the State of Illinois or by any ordinance or regulation, present or future, of the City of Chicago, or other public

body, affecting or relating to said properties, and that with respect to said properties it will promptly and fully perform and comply with all such laws, ordinances and regulations."

(5) The properties of the plaintiff granted, demised and leased by it in perpetuity to said Chicago Junction Railway Company, as aforesaid, did not include plaintiff's platforms, chutes and pens used in the loading and unloading of carload shipments of livestock for the trunk-line railroads. [fol. 249] Since May 19, 1922 all railroad properties formerly owned, possessed or operated by plaintiff, and all railroad properties previously owned, leased, possessed or operated by said Chicago Junction Railway Company have been, and now are, operated by The Chicago River and Indiana Railroad Company as a common carrier by rail for hire as a part of the system of railroads commonly known as the New York Central System.

(6) Loading and unloading of livestock at plaintiff's Union Stock Yards in the City of Chicago and the furnishing of the facilities therefor are part of the interstate transportation by railroad of livestock to and from said yards in the sense that the trunk-line railroads under the law must furnish such services and facilities as a part of their obligation to the shipper. The services of loading and unloading livestock at plaintiff's stockyard (irrespective of the legal aspect thereof) are in their nature stockyard and not railroad services. The trunk-line railroads hire plaintiff to perform these services for them and to furnish the necessary facilities.

(7) The Court finds that the unloading of interstate shipments of livestock from railroad cars into suitable pens at the Union Stock Yards, Chicago, is an interstate transportation service which the Interstate Commerce Act requires the common carriers by railroad transporting livestock in interstate commerce to the Union Stock Yards to furnish, and that the Interstate Commerce Commission has power to regulate such service only by orders directed to the said carriers.

(8) Since shortly after plaintiff started business in 1865 it has performed, and still performs, for the trunk-line railroads, as their agent, the said services of loading and unloading carload shipments of livestock consigned by rail

from and to its said stockyard, and (except for a short period when a portion thereof was paid by shippers) its charges for said services have been paid to it, and are now paid to it, by the trunk-line railroads transporting such shipments to and from said stockyard. Shipments of livestock consigned from and to consignors and consignees at said stockyard by rail must be loaded and unloaded by means of plaintiff's platforms, chutes and pens. Plaintiff does not furnish any vehicle or any motive power for, nor in any way carry, the livestock which it unloads or loads for said railroads, but drives such livestock from the railroad cars into suitable pens owned by plaintiff or from pens owned by plaintiff into the railroad cars. Under plaintiff's rules the said services of loading and unloading are not permitted to be performed by any persons not employed by the plaintiff. Plaintiff insists upon performing these services (a) because they are inherently stockyard services and are performed on the premises of plaintiff; (b) because the work of loading and unloading requires men long trained in the handling of all kinds of livestock, and plaintiff has and the railroads do not have such personnel; (c) because livestock, which is a perishable commodity, must be unloaded immediately in order to prevent [fol. 250] congestion and delay, and the railroads as a practical matter could not perform the service efficiently; (d) because divided responsibility would result in an interference with the even and efficient flow of traffic essential to the successful operation of a livestock market; (e) because plaintiff could not properly serve its non-railroad patrons if it permitted the railroads to perform the loading and unloading; and (f) because of other practical objections, such as wage scales and working conditions, which would make it inadvisable for plaintiff to permit the railroads to do the work on its property.

(9) At all times since the construction of the Union Stock Yards, and now, plaintiff has owned, maintained and exclusively operated loading and unloading platforms, chutes and pens whereby livestock transported by railroad in interstate and Illinois intrastate commerce and consigned by or to persons at the Union Stock Yards is loaded into or unloaded from railroad cars in which it is transported.

(10) The trunk-line railroads in their tariffs on file with the Interstate Commerce Commission and Illinois Com-

merce Commission provide that they will transport inbound carload shipments of livestock to pens in plaintiff's stockyard and transport outbound carload shipments of livestock from pens in plaintiff's stockyard, and in said tariffs the said trunk-line railroads also provide that they will pay plaintiff its charges for unloading inbound carload shipments of livestock from the railroad cars into suitable pens and its charges for loading outbound carload shipments of livestock from said pens into the railroad cars. The term "suitable pens" is defined in said tariffs as meaning "the pen into or from which livestock is loaded, unloaded or reloaded directly from or to the car." Plaintiff is listed in said tariffs as an industry operating a stockyard, and its stockyard is shown in said tariffs as a station on the line of Chicago Junction Railway, which is a trade name used by The Chicago River and Indiana Railroad Company in operating the properties covered by the aforesaid lease of May 19, 1922. Plaintiff does not have, and is not a participating carrier in, any tariff on file with the Interstate Commerce Commission naming rates or charges for the transportation of persons or property from place to place. The only tariff which plaintiff has on file with the Interstate Commerce Commission is a tariff stating its charges for performing, as a carrier's agent, the services of loading and unloading livestock at its stockyard in the City of Chicago. Plaintiff has no tariffs on file with the Illinois Commerce Commission, the tribunal charged with the regulation of intrastate rates of common carriers by railroad [fol. 251] in the State of Illinois, and has never been required by said Commission to file tariffs of any kind or character. Inbound carloads of livestock consigned to consignees at said stockyard by rail are transported by the various trunk-line railroads serving the City of Chicago with their own engines and crews to the unloading platforms and chutes of plaintiff, where plaintiff unloads such livestock for said railroads from the railroad cars into suitable pens in said stockyard owned by plaintiff. Outbound carload consignments of livestock shipped by rail are loaded by plaintiff for said trunk-line railroads from its pens in said stockyard into railroad cars furnished and placed for loading by said railroads adjacent to plaintiff's platforms and chutes, and are thereafter transported from said platforms by the said railroads with their own engines and crews. The trains of said railroads do not come upon

the property of plaintiff, and plaintiff exercises no control over them. Said railroads employ plaintiff to perform the loading and unloading services for them and pay plaintiff its charges therefor.

(11) Plaintiff owns, conducts and operates its said stockyard in the City of Chicago, and furnishes at said stockyard services and facilities in connection with the receiving, buying, selling, marketing, feeding, watering, holding delivery, shipment, weighing and handling of livestock transported by railroad trains and motor vehicles to and from said stockyard, including the services of loading and unloading livestock for the trunk-line railroads. Said stockyard is approximately one mile in length and one-half mile in width, and plaintiff maintains and operates therein numerous pens, driveways, buildings, scales and other facilities used and useful in the operation of said stockyard, including platforms, chutes and pens which are used for unloading livestock from railroad cars and motor vehicles following the inbound movement of such livestock and for loading livestock into railroad cars and motor vehicles for outbound movement. Livestock is transported to and from said stockyard by the trunk-line common carriers by railroad which serve said City of Chicago, and also by motor vehicles.

(12) At the hearing before the Examiner of the Interstate Commerce Commission in the City of Chicago plaintiff sought and attempted to introduce evidence to show the matters and things alleged in section 10 of its bill of complaint, but the Examiner presiding at said hearing refused to receive such evidence or any evidence pertaining to public stockyards other than plaintiff's stockyard. The only objection offered by any party to the admission of such evidence was on the ground that it was irrelevant and immaterial. The said Examiner refused to permit plain-
[fol. 252] tiff to ask questions of its witness designed to bring out such evidence; refused to permit plaintiff to show the qualifications of said witness to testify with respect to such evidence; refused to permit plaintiff to have exhibits containing such evidence marked for identification by the reporter of said Commission; and refused to allow plaintiff to make specific offers of proof of such evidence. On or about September 8, 1937, plaintiff filed with the Interstate Commerce Commission a petition for further hearing before final submission, in which it briefly stated the nature

and purpose of the evidence which it wished to adduce (to-wit, the evidence described in section 10 of the bill of complaint filed herein) and which the said Examiner had refused to receive, and set forth the aforesaid refusals of the Examiner; and in said petition plaintiff prayed that said proceeding before said Commission be set for further hearing, that the Examiner assigned to hear the proceeding be instructed to receive the evidence rejected at said hearing in the City of Chicago or such part thereof as the Commission might deem material and relevant, that in any event that plaintiff be given an opportunity at a further hearing before final submission to make offers of proof of specific facts in respect of any such evidence not received or deemed immaterial or irrelevant by the said Commission, including the opportunity to have exhibits marked for identification and to offer them in evidence, and that the said Commission grant such further relief in the premises as might be meet. Plaintiff was unable in said petition to set forth specifically the evidence which it wished to offer because the rules of practice of the said Commission provided that "If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative." The said Commission by an order entered on November 8, 1937 denied said petition for further hearing before final submission.

(13) Plaintiff does not possess, operate or control in any way, either directly or indirectly, any railroad or part thereof or any cars, locomotives or other railroad rolling stock or other railroad facilities; it does not transport, nor hold itself out to transport, persons or property from place to place by rail or otherwise; it is not, either directly or indirectly, associated with, or controlled by, or in the control of, or affiliated with, any common carrier by railroad or any person, firm or corporation owning, controlling or operating any common carrier by railroad; it does not, di- [fol. 253] rectly or indirectly, have any interest in, nor share in the profits of, any common carrier by railroad; it does not issue and is not a party to bills of lading or waybills; it is not treated as a common carrier by the railroads serving its stockyard; and it does not perform, nor hold itself out to perform, any services or acts as a common carrier by railroad or otherwise.

27. In failing and refusing to make each and every of the conclusions of law requested by plaintiff in its motion filed March 20, 1939 pursuant to rule 52(b) of the Federal Rules of Civil Procedure, namely:

(1) The order of the Interstate Commerce Commission herein assailed is invalid, null and void because under the evidence of record in the proceeding before the Interstate Commerce Commission in I. & S. Docket No. 4296 plaintiff is not a common carrier.

(2) Said order is invalid, null and void because under the evidence of record in the said proceeding before the Interstate Commerce Commission plaintiff is not a common carrier by railroad.

(3) Said order is invalid, null and void because plaintiff is not a common carrier subject to the provisions of the Interstate Commerce Act.

(4) Said order is invalid, null and void because plaintiff is not a common carrier by railroad subject to the provisions of the Interstate Commerce Act.

(5) Said order is invalid, null and void because there is no law which requires plaintiff to maintain on file with the Interstate Commerce Commission any tariff stating the charges made by plaintiff for the services of loading or unloading carload shipments of livestock at its stockyard in the City of Chicago.

(6) Said order is invalid, null and void because the Interstate Commerce Commission in said proceeding failed and refused to receive competent, relevant and material evidence proffered by plaintiff, and failed and refused to permit the plaintiff to qualify its witness, or have exhibits marked for identification, or make specific offers of proof with respect to competent, relevant and material evidence.

(7) Said order is invalid, null and void because it was made and entered by the Interstate Commerce Commission without according to plaintiff, although duly demanded by the plaintiff, a full hearing as required by paragraph 7 of Section 15 of the Interstate Commerce Act.

[fols. 254-261] Wherefore, plaintiff prays that said final decree entered herein on March 9, 1939 by the District Court be reversed, that a decree be entered perpetually enjoining,

setting aside, annulling and suspending the order of the Interstate Commerce Commission complained of and perpetually enjoining the enforcement, operation and execution of said order, and that plaintiff be granted such other and further relief in the premises as in equity and in justice it is entitled to receive.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Bryce L. Hamilton, Solicitors for Plaintiff, The Union Stock Yard and Transit Company of Chicago. Address for service: 1400 First National Bank Building, Chicago, Illinois.

Dated April 7, 1939.

[fols. 262-263] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—April 7, 1939

The Union Stock Yard and Transit Company of Chicago, plaintiff in this cause, having filed its petition for appeal to the Supreme Court of the United States, its assignment of errors and its statement as to the jurisdiction of the Supreme Court of the United States to review the final decree heretofore entered in this cause, and it appearing that the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree;

It is Ordered that the appeal of The Union Stock Yard and Transit Company of Chicago, plaintiff herein, to the Supreme Court of the United States from the final decree heretofore in this cause on March 9, 1939 be and the same is hereby allowed, and that a citation be issued returnable thirty days from the date hereof;

It is Further Ordered that the said plaintiff shall give an appeal bond with good and sufficient security in the sum of Five Hundred ($500.00).

Enter:

Evan A. Evans, United States Circuit Judge, Charles E. Woodward, United States District Judge, M. L. Igoe, United States District Judge.

Dated April 7, 1939.

[fols. 264-269] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER WITH RESPECT TO RECORD—April 7, 1939

This Court having upon application allowed the plaintiff to take an appeal to the Supreme Court of the United States from the final decree entered by this Court in the above entitled cause on March 9, 1939,

It is Ordered that the Clerk of this Court shall make and transmit to the Supreme Court of the United States under his hand and the seal of this Court a true copy of the material parts of the record in this proceeding, as provided by law and the Rules of the Supreme Court of the United States; provided, however, that the clerk of this Court shall certify and transmit to the Supreme Court of the United States separately as original exhibits Plaintiff's Exhibits A, B and C (which were received in evidence at the final hearing before this Court on February 20, 1939) instead of a transcript or copy thereof, and that any party hereto may refer to said original exhibits in his or its briefs and arguments with like effect as though they were printed as part of the record.

Enter:

Evan A. Evans, United States Circuit Judge, Charles E. Woodward, United States District Judge, M. L. Igoe, United States District Judge.

Dated: April 7, 1939.

[fols. 270-271] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING APPEAL BOND—April 7, 1939

This cause coming on for hearing upon the oral motion of plaintiff for the approval of its appeal bond, and the Court being fully advised in the premises, and it appearing to the Court that said bond is in proper form and with good and sufficient security,

It is Ordered, that the appeal bond presented in this cause by plaintiff in the principal amount of $500 be and the same is hereby approved.

Enter:

Evan A. Evans, United States Circuit Judge, Charles E. Woodward, United States District Judge, M. L. Igoe, United States District Judge.

Dated: April 7, 1939.

[fols. 272-273] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER WITH RESPECT TO REPORTER'S TRANSCRIPT OF PROCEEDINGS AT FINAL HEARING—April 7, 1939

This Court having upon application allowed the plaintiff to take an appeal to the Supreme Court of the United States from the final decree entered by this Court in the above entitled cause on March 9, 1939, and the plaintiff having presented to this Court two copies of a reporter's transcript of the proceedings (exclusive of oral argument) at the final hearing in this cause on Monday, February 20, 1939,

It is Ordered that the said two copies of the reporter's transcript of proceedings (exclusive of oral argument) at the final hearing in this proceeding on Monday, February 20, 1939, be filed, and that said reporter's transcript be and it is hereby made a part of the record in this cause;

It is Further Ordered that one copy of said reporter's transcript may be used by the clerk of this Court in making up the transcript of the record.

Enter:

Evan A. Evans, United States Circuit Judge, Charles E. Woodward, United States District Judge, M. L. Igoe, United States District Judge.

Dated: April 7, 1939.

[fol. 274] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORTER'S TRANSCRIPT OF PROCEEDINGS AT FINAL HEARING ON FEBRUARY 20, 1939—Filed April 7, 1939

Be it remembered that on Monday, February 20, 1939, before the Hon. Evan A. Evans, Judge of the United States

Circuit Court of Appeals, Seventh Circuit, Hon. Charles E. Woodward and Hon. Michael L. Igoe, Judges of United States District Court, Northern District of Illinois, Eastern Division, sitting en banc, this cause came on for hearing upon the pleadings heretofore filed herein.

Present: Mr. Ralph M. Shaw, Mr. Frederick H. Wood, Mr. William F. Riley, Mr. Guy A. Gladson, Mr. Bryce L. Hamilton, appeared for plaintiff.

[fol. 275] Mr. Elmer Collins, Special Assistant to the United States Attorney General, appeared for the United States.

Mr. Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, appeared for Interstate Commerce Commission.

Mr. Kenneth F. Burgess, Mr. Douglas F. Smith, appeared for Intervening Railroads.

Mr. Lee J. Quasey, appeared for National Live Stock Marketing Association.

The Clerk: Number 16,200, Union Stock Yard and Transit Company of Chicago versus United States of America, and Interstate Commerce Commission, petition to intervene as party defendant.

Justice Evans: Before taking up this matter, I want to call attention to the fact that the name of one of the Judges sitting this morning, Mr. Igoe, appears upon the complaint as Plaintiff's counsel. He was then United States District Attorney and in that capacity signed it. He does not care to sit in the case under any circumstances, but he is not conscious of any prejudice one way or the other. If the parties are perfectly willing and all agree and will put it of [fol. 276] record here that there is no objection to him because of his having signed the complaint he will sit; otherwise, we will have to get another judge.

Mr. Shaw: I did not quite hear what your Honor said, but as I got it, it was on the question as to whether the parties litigant would have any objection to his Honor, Judge Igoe, sitting in this case.

Justice Evans: Yes.

Mr. Shaw: I might say we will be delighted, on behalf of the Plaintiff, to have his Honor sit in the case.

Mr. Collins: We have no objections.

Mr. Smith: The railroad intervenors have none.

Justice Evans: Very well.

The Clerk: Petition to intervene as party defendant.

Justice Evans: Any objection?

Mr. Gladson: No objection on the part of the Plaintiff.

Mr. Quasey: Your Honor, I appear on behalf of the National Livestock Marketing Association, petitioning to intervene in this cause.

Justice Evans: Is that the one now seeking to intervene?

[fol. 277] Mr. Quasey: Yes.

Justice Evans: Any objection?

Mr. Gladson: No obection on the part of the Plaintiff.

Justice Evans: You may intervene.

The Clerk: Final hearing.

Justice Evans: Is it up for final hearing today?

Mr. Gladson: Yes, your Honor.

Justice Evans: All right. Then let the evidence be forthcoming.

Mr. Gladson: In view of the fact that this is a bill to set aside an order of the Interstate Commerce Commission, practically the only evidence that the plaintiff will have will be a certified copy of the record before the Commission. In order to conserve the time of the court, I will ask that this record, which consists of a number of exhibits and the transcript of the testimony be marked Plaintiff's Exhibit A, collectively, and I will offer it at this time.

Justice Evans: Are they any objections?

Mr. Smith: Mr. Gladson, that constitutes the entire group of exhibits accepted by the Commission?

Mr. Gladson: That is true, all the exhibits accepted by [fol. 278] the Commission or incorporated by reference in the record having been certified to by the Commission.

Mr. Collins: And it, of course, includes all of the oral testimony?

Mr. Gladson: Yes, it includes all of the oral testimony. As a matter of fact, I handed to counsel for the intervenors and government this morning a separate list of the exhibits.

Mr. Collins: No objection.

Justice Evans: It may be received.

(Said document, so offered and admitted in evidence, was marked Plaintiff's Exhibit A (consisting of 32 parts), each part being separately marked.)

Mr. Gladson: I would like also to have marked as Plaintiff's Exhibit B for identification, a certified copy of the rules of practice of the Interstate Commerce Commission. The reason for this is that the Commission take judicial notice of its own rules and practice, but the record does not

contain those rules and practice. This may be important [fol. 279] in connection with the procedural matter that will be argued before the Court. I will offer Exhibit B.

Justice Evans: No objection? It may be received.

(Said document, so offered and admitted in evidence, was marked Plaintiff's Exhibit B.)

Mr. Gladson: I would also like to have marked as Plaintiff's Exhibit C for identification a certified copy of the articles of incorporation of The Chicago River and Indiana Railroad Company, which is the lessee of one of the affiliated corporations of the plaintiff in this case.

Mr. Collins: No objection.

Mr. Smith: We should like to have copies of the exhibit.

Mr. Gladson: I will furnish copies later.

Justice Evans: Exhibit C.

(Said document, so offered and admitted in evidence, was marked Plaintiff's Exhibit C.)

Mr. Gladson: That completes the evidence for the plaintiff, your Honor.

Justice Evans: Any evidence for the defendant?

[fol. 280] Mr. Collins: We have no evidence.

Mr. Gladson: The oral argument will be made by Mr. Frederick Wood and Mr. William F. Riley.

Justice Evans: Just so we may be sure about this now, the evidence is closed.

Mr. Gladson: Yes.

Justice Evans: Very well.

Mr. Smith: If your Honors please, I shall want to call the Court's attention to an order made by the Commission since the close of this case, but simply as bringing it to the judicial knowledge of your Honors.

Justice Evans: If you want to call attention to something we cannot take judicial notice of, it is your duty to introduce it in evidence.

Mr. Smith: I was going to call attention to it as an order of which the Court will take judicial knowledge.

Justice Evans: We are not passing on whether we will or not.

Mr. Smith: I understand, sir.

Justice Evans: Very well, then. The testimony is closed.

(Which was all the evidence offered or received on the [fol. 281] hearing of the above entitled cause.)

(Thereupon Mr. Frederick H. Wood and Mr. William F. Riley, solicitors for Plaintiff, presented to the Court oral argument in support of the allegations of the Bill of Complaint;

Mr. Daniel W. Knowlton, solicitor for Interstate Commerce Commission; Mr. Douglas F. Smith, solicitor for Intervening Railroads; Mr. Lee J. Quasey, solicitor for National Livestock Marketing Association, and Mr. Elmer Collins, solicitor for United States of America, presented to the Court oral argument in reply thereto; and Mr. Frederick H. Wood presented to the Court the closing argument for Plaintiff.)

Justice Evans: We will take about fifteen minutes and determine what time or what action we will take with reference to briefs or disposition of the case. If counsel will stay here fifteen or twenty minutes, why we will be back here.

(Interruption.)

[fol. 282] Justice Evans: In view of the amount of work which we have at all times on our table, we believe that in these three-judge cases we should dispose of them at the time of the argument, if we are all of us thoroughly convinced as to the soundness of the views which we hold are the prevailing views.

In the present case the question is one which doubtless will go further, but we have nevertheless approached it as though it was for us to determine, and we are satisfied that the decision is this case must be for the defendant; that the only question involved is one of jurisdiction and that, because of the definitions that are given to "common carrier" and to "transportation", the services rendered by the plaintiff make the plaintiff come within the provisions of the Interstate Commerce law. That is strengthened by the late decision of the Denver Stockyards case.

Under all the circumstances we have reached the conclusion that the judgment in this case should be for the defendant.

Both sides may within ten days submit proposed findings of fact and conclusions, first having submitted them to each [fols. 283-287] other. To make the thing definite and specific, the defendant will submit the findings to the plaintiff within five days and the plaintiff will have five days in

which to make proposed corrections or changes or modifications, and the counsel may then have five days, if they wish, within which to see if they cannot unite upon the findings. Otherwise mail them to us.

There isn't any conflict in the findings, but nevertheless it will be helpful to the Supreme Court if the story be told in the form of findings,—not telling everything from the history of the stockyards to the present, but the vital issues.

[fol. 288] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE WITH RESPECT TO APPEAL—Filed April 8, 1939

To The Honorable John E. Cassidy, Attorney General, State of Illinois, 160 North La Salle Street, Chicago, Illinois:

You are Hereby Notified that The Union Stock Yard and Transit Company of Chicago, plaintiff, has taken an appeal to the Supreme Court of the United States from the final decree entered by the District Court on Mar. 9, 1939 in the above entitled case, and that the order allowing the appeal entered by the District Court on April 7, 1939 provides that citation be issued returnable thirty days from the date of said order.

Copies of the following papers are herewith served upon you:

(1) Petition for appeal;
(2) Assignment of errors;
(3) Statement as to the jurisdiction of said Supreme Court to review the final decree of the District Court;
(4) Order allowing appeal entered by the District Court on April 7, 1939; and
(5) Order approving appeal bond entered on April 7, 1939 by the District Court.

Your attention is directed to the provisions of paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, effective February 27, 1939, which provides that within fifteen days after the service of this notice

and the papers hereinabove mentioned the appellee may [fols. 289-294] file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States asserted by the appellant, and which further provides that there may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm.

This notice is given to you pursuant to the provisions of the Urgent Deficiency Appropriation Act, United States Code, Title 28, Section 47a.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Bryce L. Hamilton, Solicitors for Plaintiff, The Union Stock Yard and Transit Company of Chicago. Address for service: 1400 First National Bank Bldg., Chicago, Illinois.

Received a copy of the foregoing Notice and the papers referred to above, this 8th day of April, 1939.

John E. Cassidy, Attorney General, State of Illinois.

[fol. 295] In United States District Court

[Title omitted]

Præcipe for Record—Filed April 8, 1939

To the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

You will please prepare a transcript of record to be transmitted to the Supreme Court of the United States pursuant to the appeal of The Union Stock Yard and Transit Company of Chicago, plaintiff, heretofore allowed in this cause, and include therein the following:

1. Bill of Complaint.
2. Order convening three-judge court.
3. Acknowledgment of service by United States.
4. Acknowledgment of service by Interstate Commerce Commission.
5. Answer of United States of America.
6. Answer of Interstate Commerce Commission.
7. Motion to intervene as parties defendant filed by Atchison, Topeka and Santa Fe Railway Company, et al.

8. Order allowing intervention of Atchison, Topeka and Santa Fe Railway Company, et al.

[fol. 296] 9. Answer of railroad interveners, Atchison, Topeka and Santa Fe Railway Company, et al.

10. Motion to intervene as party defendant filed by National Live Stock Marketing Association.

11. Order allowing intervention of National Live Stock Marketing Association.

12. Answer of intervener National Live Stock Marketing Association.

13. Reporter's transcript of proceedings in court on February 20, 1939.

14. Plaintiff's suggested modifications of defendants' proposed findings of fact.

15. Findings of fact, conclusions of law and form of decree proposed by defendants and interveners.

16. Findings of fact and conclusions of law entered by Court on March 9, 1939.

17. Final decree entered by Court on March 9, 1939.

18. Motion of plaintiff for amendment of findings and additional findings, and for amendment of final decree.

19. Motion of defendants and intervening defendants to amend or modify the findings of fact and conclusions of law entered by the Court.

20. Order denying motions of plaintiff and defendants to modify the findings of fact and conclusions of law entered by Court.

21. Petition for appeal.

22. Assignment of errors.

23. Jurisdictional statement.

24. Order allowing appeal.

25. Citation.

26. Order with respect to record.

27. Bond on appeal.

28. Order approving bond.

29. Order with respect to reporter's transcript of proceedings of final hearing.

30. All acknowledgments and proofs of service in addition to those above mentioned.

[fols. 297-303] 31. All notices.

32. All orders in addition to those above mentioned.

33. All docket entries.

34. All motions in addition to those above mentioned.

35. All papers and documents in addition to those above mentioned, except briefs.

36. Clerk's certificate of transcript of record.

You will please show filing dates and docket entries, but omit all captions of case in United States District Court on papers filed in said Court except the caption of the bill of complaint.

You will also please transmit to the Supreme Court of the United States pursuant to the appeal of The Union Stock Yard and Transmit Company of Chicago, plaintiff, as original exhibits pursuant to the order of Court with respect to record entered April 7, 1939, the following:

1. Plaintiff's Exhibit A (being a certified copy of the record before the Interstate Commerce Commission).

2. Plaintiff's Exhibit B.

3. Plaintiff's Exhibit C.

4. Clerk's certificate that foregoing exhibits are original exhibits offered and received in evidence at the final hearing of this cause in the United States District Court on February 20, 1939.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Bryce L. Hamilton, Solicitors for Plaintiff, The Union Stock Yard and Transit Company of Chicago.

Address for service: 1400 First National Bank Building, Chicago, Illinois.

[fol. 304] **Plaintiff's Exhibit "A"**

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. No. 4296

Cancellation of Livestock Services at Chicago

Petition of Respondent for Further Hearing Before Final Submission and for Other Relief

Comes now The Union Stock Yard and Transit Company of Chicago, respondent in this proceeding, and now your petitioner, and respectfully petitions the commission to

grant a further hearing herein and the other relief hereinafter prayed for, and in support thereof respectfully says:

I

This petition is unusual for the reason that it is an appeal to the full commission for the full and fair hearing to which respondent is entitled and which it thinks it did not receive. The proceeding arose from an attempt by the respondent, a stockyard company operating at Chicago, to cancel its schedules on file with the commission for loading and unloading rail-borne live stock. Notwithstanding the efforts of others to bring in extraneous matters, the only ultimate question involved in this proceeding is whether re- [fol. 305] spondent is a common carrier by railroad within the meaning of the Interstate commerce act. If it is not such a carrier, the commission should decide in its favor; if it is such a carrier, the commission should hold against it. On this fundamental question there may be a difference of opinion.

But on the question of whether respondent is entitled to a full and fair hearing in presenting its case to the officer or tribunal that must intially decide it there can be no debate. Section 15(7) of the act provides that the commission may enter an order in an investigation and suspension case "after full hearing." A "full hearing" is defined in The New England Divisions Case, 261 U. S. 184, 200, as:

"• • • one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

Discussing the requisites of a fair hearing in Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 93, the Supreme court said:

"All parties • • • must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

Citing the case just mentioned as authority, the Supreme Court said in Atchison Ry. Co. v. United States, 284 U. S. 248, 262:

"In the discharge of its [i. e. the commission's] duty, a fair hearing is a fundamental requirement."

[fol. 306] In Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510, at page 525, the Supreme court said:

"The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. * * * as construed by the state court, all these rights were amply secured by the statute, which declared that the Commission, 'after a full hearing,' might require track connection. * * * The defendant * * * had the right to cross-examine witnesses * * * and the privilege of offering evidence on every matter material to the investigation."

II

More specifically: Respondent's cancellation tariffs were suspended by the commission and a formal investigation instituted. Two hearings were held, one at Washington before a commissioner, sitting to take evidence, and an examiner; the other at Chicago before an examiner. It is of the second hearing that respondent particularly complains.[1] At that hearing the Examiner refused, arbitrarily we conceive, to allow respondent:

(1) To present any evidence concerning the situation at any stockyard other than Chicago or any facts pertaining to [fol. 307] such other stockyards, regardless of the character of the evidence or the reasons advanced for producing it;[2]

(2) To make its record for review by offers of proof of specific facts, either oral or documentary, in the case of such

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[1] The commissioner presiding at the first hearing indicated that he would rule in the same manner as the Examiner later ruled at the second hearing, but the occasion did not arise for a specific ruling at that hearing except in connection with the proffer of evidence not of great consequence. (Tr. 81-83)

[2] The scope of the Examiner's ruling is clearly set forth at page 515 of the transcript where he said: "* * * that no matter what the conditions at other stockyards may be, those conditions cannot have any bearing upon or any effect upon the commission's determination of the status of the Union Stock Yard and Transit Company."

rejected evidence, or to develop the evidence it so sought to prove by means of questions directed to the witness; or

(3) Even to have the reporter mark for identification or to offer exhibits the Examiner conceived to be irrelevant or immaterial.

These rulings of the Examiner were not mere errors of judgment which arose during the heat of argument at the hearing. There was nothing casual about them. They were made as a result of a premeditated policy, announced when the occasion first arose, before argument, and consistently adhered to throughout the hearing. The witness was not even allowed to state his qualifications to testify to matters considered immaterial by the Examiner. The Examiner enforced these rulings rigidly at all times. His action was deliberate and calculated, and if it was improper as we believe, the commission should peremptorily grant the relief requested herein.[2]

In the succeeding sections of this petition we shall develop in more detail the reasons why the rulings of the Examiner were erroneous.

[fol. 308] III

The presiding commissioner at the first hearing introduced as an exhibit a copy of the commission's report in I. & S. docket 4109, Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330, a previous proceeding in which a majority of the commission held respondent to be a common carrier by railroad. (Tr. 5, Ex. 1) In this report the commission advanced as a reason why the act should be construed to cover the loading and unloading operations of respondent the danger that the remedial purposes of section 15 (5) might not be fully accomplished if the railroads were left to barter-and-trade methods in procuring loading and unloading services necessary to complete the transportation of live stock to and from public markets, and that such charges, if unregulated, might result in higher rates to shippers. 213 I. C. C. at 338-339.

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[2] The details which support the statements made in this section are found on the following pages of the transcript: 98, 245-248, 249-250, 255-256, 257, 258, 261-273, 320-321, 344-345, 350, 368-369, 423, 456, 459, 460-475, 509-511, 527-529, 549-550.

In that report the commission said at page 339:

"For the reasons above given we believe that it must be concluded that respondent, in performing the described services commencing or terminating interstate transportation by railroad, is a common carrier subject to the act. Such services, expressly made by the act parts of the railroad transportation to be furnished by the railroads, the latter absorbing the charge therefor without making a separate charge against shippers, were not intended to be left for 'barter and trade' like the purchase of fuel or of rolling stock or the making of contracts for construction."

[fol. 309] Again at pages 338 and 339:

"There is a great deal of reason for so doing [i. e., assuming jurisdiction over loading and unloading services] from the standpoint of giving full effect to the remedial purpose of section 15 (5). The fact that the railroads must proffer the service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable. If respondent doubles its present charge of $1.25, it must still be absorbed. Either the railroads must bear the increase or pass it on to the shippers in an increased through rate."

Obviously respondent was entitled to rebut such evidence by proving facts that would tend to show that the conclusion of the commission was wrong. This it was prepared to do by proving that even though the railroads employ the services of stockyard companies (all unregulated by the commission except respondent) in loading and unloading live stock at all of the public yards of the country, there have been no substantial controversies over these charges except in two or three instances; that some yards publish their charges for such services in their tariffs on file with the Secretary of Agriculture; that at other yards where so-called barter-and-trade methods obtain the railroads have been able to agree with the stockyard companies on the matter of charges without hardship to the railroads and without increasing their line-haul rates.[1] Respondent was

[1] An offer of proof in language no more specific than the foregoing brought forth the following comment from the Examiner: "* * * I want to state here these offers giving the details of the testimony are not going to be accepted." (Tr. 269)

also prepared to show by detailed evidence, both oral and [fol. 310] documentary, that the facts and circumstances at other yards are not essentially different from those obtaining at Chicago.

No argument should be necessary to show the relevancy of this evidence. The act to regulate commerce must be construed as one of general application. It is a public, not a private, act, and no part of it can be considered as applying only to Chicago. The best proof, therefore, on the question of whether the remedial provisions of section 15(5) can be carried out without regulation of stockyards by the commission is the nation-wide experience of the railroads in the absence of such regulation. The proof of the pudding is in the eating. Nevertheless, the Examiner refused to allow respondent to introduce any such evidence.

IV

Certain evidence concerning other yards was admissible on still another ground. In its report in I. & S. docket 4109 (Ex. 1) at page 339 the commission said:

"It has been urged that the Secretary of Agriculture would have jurisdiction over the charge. We are of the view that he would not have such jurisdiction whether or not the same is reposed in the commission."

It is our purpose on brief and upon oral argument to argue that this conclusion was wrong. The Packers and stockyards act, 1921, section 301(b), gives the Secretary jurisdiction over "services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a com- [fol. 311] mission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of live stock." 7 U. S. C. A., sec. 201. Under this authority the Secretary exercises complete jurisdiction over all services rendered by public stockyards, including respondent's yard, in connection with live stock brought in by motor trucks. This broad grant of power to the Secretary is diminished only to the extent that the commission has jurisdiction over public stockyards. Packers and stockyards act, section 406; 7 U. S. C. A., sec. 226. It follows that if the commission does not have jurisdiction over respondent the Secretary has power to regulate its loading and unloading charges.

As tending to show that the Secretary, who is the administrative officer charged with the duty of carrying out the

provisions of the Packers and stockyards act, 1921, agrees with our construction of that act, respondent should have been permitted to show that at many yards, under conditions similar to those obtaining at Chicago, the loading and unloading charges are included in tariffs on file with the Secretary of Agriculture, and that these charges are paid by the railroads, including those protesting in this case, without question.

Moreover, in the present case, respondent stated unequivocally that it was not seeking to escape all regulation, but was merely asserting its legal right not to be kept in the difficult position of trying to obey two masters. As evidence of its good faith, its officers stated under oath (and counsel [fol. 312] here again state) that respondent, if held not to be a common carrier by the commission, would publish its loading and unloading charges in its tariffs filed with the Secretary of Agriculture. In order to show that this offer would not be futile, respondent should have been allowed to prove that the Secretary permits other stockyards so to publish their loading and unloading charges with him.

V

In his dissenting opinion in I. & S. docket 4109 (Ex. 1), Commissioner Meyer said at page 342:

"If the conclusions set forth in this report be sound, this Commission has jurisdiction over every stockyard in the United States. I am not persuaded that Congress has given us such jurisdiction. I had supposed that the Department of Agriculture had been given jurisdiction over all charges for stockyard services, and that the fact that loading and unloading livestock are transportation services within the meaning of the act does not make every agent who performs such services a common carrier by railroad subject to the act. An individual may, and often does, perform for a common carrier railroad a portion of its transportation service, but this does not make the individual who, like the Stock Yards Company, operates no railroad, a common carrier by railroad. In Docket No. 7008, Atchison, T. & S. F. Ry. Co. v. Kansas City S. Y. Co., 33 I. C. C. 92, this Commission unanimously held that the Kansas City Stockyards Company was not a common carrier engaged in interstate commerce. Although many changes have taken place since that time, the basic principles discussed and relied upon

[fol. 313] therein are as sound today as they were then. The instant report is a reversal of those principles.

"If it is thought that this Commission should have jurisdiction over all services and charges of all stockyards, whether common carriers or not, we should ask Congress, rather than the Supreme Court, to bestow that jurisdiction upon us."

Four commissioners did not participate in this decision.[1]

The Examiner had no right to presume that in the present proceeding the four non-participating commissioners or other commissioners could not be persuaded by brief or oral argument that Commissioner Meyer's views were sound.[2] Nor can the commission make such an assumption without prejudging the case. In order that it can make such an argument, respondent must have a factual basis for it.

The Examiner, therefore, should have permitted respondent to show the correctness of the dissenting opinion by proving that the situation at Chicago is not essentially different from the situation at other markets, and should have permitted it to prove other facts tending to show that the principles announced in the Kansas City Case are basically as sound today as when announced. Obviously this could [fol. 314] not be adequately done by confining the evidence to facts pertaining only to Chicago. The Examiner should also have allowed respondent to show that railroads in many instances employ non-carrier companies or individuals other than stockyards to perform transportation services for them without subjecting such parties to regulation.

VI

A copy of the report of the commission in Live Stock Loading and Unloading Charges, 61 I. C. C. 223, was incorporated by reference in the record by stipulation of the

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[1] Only three commissioners are shown in the report as having failed to participate. Commissioner Eastman, who was not so listed, was at that time occupied with his duties as Federal Coordinator of Transportation and did not take part in the proceeding. 213 I. C. C. II.

[2] The Examiner would not even let the witness state his qualifications to discuss this subject in so far as it related to other yards. (Tr. 268.)

parties at the instance of protestants and without limitation as to use. (Tr. 40.) It thereupon became a part of the evidence in the case for all purposes.[1] As was said by the court in Kansas City Southern Ry. v. Albers Commission Co., 223 U. S. 573, at page 596, with respect to oral testimony concerning the existence of a lawful rate:

"True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded. Diaz v. United States, 222 U. S. 574; Schlemmer v. Buffalo, Rochester & Pittsburg Railway Co., 205 U. S. 1, 9; United States v. McCoy, 193 U. S. 593, 598."

Protestants indicated that facts in the reports of the commission might be used for any purpose for which counsel desired to use them. (Tr. 110.)

[fol. 315] Speaking of the western markets in the report so introduced in evidence, the commission said at page 224:

"Except for variations in the size of the properties and in the volume of traffic, the arrangement of facilities and the character of operations in the particular service are much the same at the several yards."

The report having been admitted in evidence and counsel for protestants having indicated that he might use any report for any purpose (Tr. 110), respondent clearly had the right to submit evidence to explain the statement above quoted, bring it up to date or otherwise amplify it.

VII

Protestants introduced an exhibit showing rail receipts at the Chicago yards on the theory that "it is quite important to show that this Union Stock Yards Company stands over at the neck of the bottle and unloads more than 100,-

[1] In connection with another report so incorporated in the record the Examiner stated that the report might be used for any purpose considered material, but would only be evidence of facts existing at the time the case was submitted unless brought down to date. (Tr. 111.) No such limitation, however, was placed on the use of the report in 61 I. C. C. 223. (Tr. 40.)

000 cars a year and says nobody can come on the place to do it * * *." (Tr. 194, Ex. 28.) The Examiner also stated that he wanted this information. (Tr. 195.)

In its decision in I. & S. docket 4109 (Ex. 1) the commission attached great importance to the fact that most of the live stock at Chicago is handled through respondent's yards and to the further fact that respondent insists on performing the loading and unloading services. It said at pages 336 and 337 of the report:

[fol. 316] "The unloading and loading of livestock at respondent's yards and the furnishing of the facilities is an inseparable part of the interstate railroad transportation. Respondent not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery.

"Having attained this status, and thereby having rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common carrier functions to another corporation." (Paragraphing ours)

Respondent was prepared to show that protestants and the commission itself attach too much importance to the facts we have referred to, and that no reason peculiar to Chicago now justifies its being set apart for regulation by the commission. A partial showing was made by testimony to the effect that the live stock business is such that a large volume of live stock can be handled only at a terminal market, and that live stock must be loaded and unloaded by experienced live stock handlers familiar with stockyard property, regulations and practices. Respondent should [fol. 317] have been permitted to complete this proof by showing that under conditions similar to those obtaining at Chicago (1) that at practically all live stock markets one stockyard company, served by all trunk-line railroads, handles the bulk of the business; (2) that at all public mar-

kets stockyard employees perform the service of loading and unloading railborne live stock; (3) that all stockyard companies have always insisted on doing this work because there would be endless confusion, slowing up of operations and inefficiency if the stockyard companies did not perform the loading and unloading service; and (4) that such companies have always held themselves out to perform it.

Respondent was also prepared to show that bottleneck conditions relatively similar to that obtaining in Chicago obtain at practically all of the public markets. (See Stafford v. Wallace, 258 U. S. 495, in which the Packers and stockyard act, 1921, was held constitutional as applied to central markets on that theory.)

VIII

Still another reason sufficient to justify the admission of evidence concerning the situation at other yards was urged by respondent. If respondent is not a common carrier by railroad, the commission has no jurisdiction over it. Nowhere in the act to regulate commerce are the terms "common carrier" or "common carrier by railroad" defined. Manufacturers Ry. Co. v. St. L. I. M. & S. Ry. Co., 21 I. C. C. [fol. 318] 304, 312. Respondent has no railroad or railroad equipment and performs no carriage, common or otherwise. It is, therefore, far from patent from the reading of the statute that respondent is a common carrier. The involved reasoning whereby the commission reached such a conclusion in I. & S. Docket 4109 indicates quite clearly that the application of the statute to respondent is doubtful. The fact that there was a dissenting opinion in that case also carries the same implication. See Merchants Warehouse Co. v. United States, 283 U. S. 501, 513-514.

There are few principles in our law that are more firmly established than that the practical construction of a written document whose meaning is doubtful, be it a contract, a statute or even the Constitution itself, will be given great weight by the courts in determining its meaning.

Out of the scores of decisions only a few will be mentioned. The principle is concisely stated by Mr. Chief Justice Hughes in Louisville & Nashville R. R. Co. v. United States, 282 U. S. 740, where at page 757 he said:

"The Act has been repeatedly amended, and has been reenacted, without any change directed to the correction

of this practice. It is strongly urged that in the light of these circumstances the administrative construction should be determinative. The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight [fol. 319] and will not be disturbed except for cogent reasons. Logan v. Davis, 223 U. S. 613, 627; Kern River Co. v. United States, 257 U. S. 147, 154; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; United States v. Minnesota, 270 U. S. 181, 205; Wisconsin v. Illinois, 278 U. S. 367, 413."

In Boston & Maine Railroad v. Hooker, 233 U. S. 97, the question involved was the validity of a limitation contained in certain tariffs on liability for loss of baggage. The court held that such a limitation was one that might properly be contained in a tariff filed under Section 6 of the act and referred to the tariff circular of the commission which required that general baggage regulations be set out in the tariffs, saying at page 118:

"This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act."

In The Pocket Veto Case, 279 U. S. 655, the question presented was whether a bill passed by Congress and presented to the President within less than ten days (Sundays excepted) prior to its adjournment had become law in view of the clause of the Constitution providing that "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law." The court held that the [fol. 320] adjournment of congress had prevented the President from returning the bill within the time allowed by the Constitution, and that it did not become law. In its opinion the court said at pages 688 and 689:

"The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of

years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."

Practical construction of a statute is of value not only where the administrative body acts under it, but also where over a period of time it fails to take action. In Davis v. Manry, 266 U. S. 401, the Supreme court was called upon to construe a provision in the Safety appliance act requiring that "all cars * * * having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders. The act empowered the commission to designate the number, dimensions and location as well as the manner of application of the appliances required, but in its regulations the commission had not required grab irons to be affixed to locomotive tenders. The court said at pages 404 and 405:

"The omission to require a grab iron is a practical construction by the Commission—the tribunal to which the application of Section 2 was entrusted and which would be solicitous to enforce it—that it applies to cars with roofs [fol. 321] and not to tenders, they having no roofs. While the view of the Commission is not conclusive with us, it is properly persuasive. We agree with it."

In Re Chalmers, P. U. R. 1928 A. 332, the Public Service Commission of New York, in passing on the question whether rapid transit companies were public utilities in respect of the sale of electricity, said at page 335:

"In this connection, it is proper to consider the practical construction put upon the statute by the public authorities charged with the administration and enforcement of the statute. For example, by subdivision 4 of section 66 it is provided that the Commission may prescribe uniform methods of keeping accounts, records, and books, to be observed by electrical corporations; by subdivision 6 of said section it is provided that the Commission may require every such corporation to file with it an annual report verified by the oath of an officer of such corporation, all such reports to be in a form prescribed by the Commission; and by subdivision 12 of the said section it is provided that the Commission

may require every electrical corporation to file with the Commission and to print and keep open to public inspection schedules showing all rates and charges and all forms of contract or agreement, etc., relating to such rates or charges.

"Although the Public Service Commission Law has now been in existence for more than twenty years, and although during that time orders have been made by this Commission and by its predecessors requiring electrical corporations to comply with the aforesaid provisions of the law and with [fol. 322] other provisions of the law applicable to electrical corporations, not one of these orders ever were served upon the defendants herein or either of them. In other words, the Commission never has considered or treated these defendants as being electrical corporations."

This decision was approved by the court of appeals in New York in a per curiam decision, Cardozo, C. J., participating. In re Chalmers, 168 N. E. 431.

The principle announced in these decisions is clearly applicable here. No one can say that since 1922, the year in which the Chicago Junction leased its properties to a subsidiary of the New York Central with the approval of the commission, the question whether respondent is a common carrier by railroad is free from doubt. It would, therefore, be competent before any tribunal to show that the commission has construed the act as not applying to other stockyards where conditions are similar to those now existing at Chicago. See Pennell v. P. & R. Ry. Co., 231 U. S. 675, 679.

Respondent spent much time in gathering all of the pertinent facts relative to the practice of the Commission over a period of many years in administering and construing the law with respect to stockyards throughout the country, where conditions are similar to those now existing at Chicago, and if permitted would have made an impressive showing in this respect. This evidence included certified copies of records from the files and proceedings of the Commission showing the status and character of the companies operat- [fol. 323] ing such other stockyards, as well as other pertinent data both documentary and oral, gathered as the result of a special study made by a witness exceptionally well

qualified both as to experience and study to testify to such matters.

The evidence, had the witness been permitted to qualify and testify, would have shown that there are approximately 135 other public stockyards in the United States under regulation by the Secretary of Agriculture, all of which perform loading and unloading services and are paid therefor by the railroads. It would have shown not only that the facilities and services are similar to those at Chicago, but that in many instances intercorporate relationships exist with the railroads serving such terminals which are similar to those now obtaining at Chicago. It would have shown that nearly all of such public yards are the sole terminals for the handling of live stock in the respective cities where they are located and that the comments made by the Commission in I. & S. 4109 with respect to a practical monopoly applies with like force at such other points. The evidence would further have shown that no one of the other yards is required by the Commission to file tariffs with it covering loading and unloading services performed for the railroads.

This situation has existed for years and the commission has known about it; yet the commission, although it is charged with the duty of seeing that the Interstate commerce act is enforced, has never required any of these other yards to submit to its jurisdiction.

[fol. 324] This evidence was not intended as a criticism of the commission or any intimation that it has neglected its duty; instead, it was intended to show that the commission, over the years, has correctly construed the act by not requiring stockyards to observe it, and that the change in status of respondent since 1922 now puts it in the same category with these other yards. Respondent has the right to show that its situation is substantially the same as the other yards, and hence that a similar construction should be given the act as applied to it.

The doctrine of practical construction is not confined to the construction of statutes by administrative officers and tribunals alone. Uniform construction of statutes by interested parties over a period of years is also given weight by the commission and the courts.

In American Asphalt Roof Corporation v. A. T. & S. F. Ry. Co., 156 I. C. C. 147, the commission said at page 155

with respect to evidence showing that for many years the tariffs [1] had been construed in a certain way:

"This is a circumstance which indicates that during many years subsequent to said November 1, all interested parties, including carriers, shippers, and consignees, construed the western trunkline tariffs as applicable only in the way the carriers have always applied them and as not capable of [fol. 325] the construction for which the complainants are now contending; and these conclusions appear to us to be in harmony with and fortified by the other facts and circumstances above set forth."

In a concurring opinion appearing on the same page Commissioner Eastman concurring said:

"I agree with the conclusion reached as to the interpretation of the tariffs in question, but only upon the ground that it appears to be consistent with the interpretation uniformly placed upon them for many years by carriers and shippers alike * * *."

In United States v. C. St. P., M. & O. Ry. Co., 43 Fed. (2d) 300, the question before the Circuit court of appeals for the eighth circuit was whether a pusher engine and tender were "cars" within the meaning of the air-brake provisions of the Safety appliance act. The evidence showed that it was the practice of railroads not to connect the power brakes of pusher engines with the air controlled by the head engine, and the court stated "that this practice has been going on openly and unchallenged for many years, and when the government was operating this railroad the same practice prevailed." At pages 305 and 306 the court said:

"If the meaning of this statute were in doubt, the practical construction given it through all these years should be

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[1] Tariffs have often been held to have the force and effect of statutes. Texas & Pacific Ry. Co. v. Leatherwood, 250 U. S. 478, 481; Wheelock v. Walsh Fire Clay Products Co. (C. C. A. 8) 60 Fed. (2d) 415, 417. The same principles of construction apply equally to tariffs and statutes. Chicago Great Western R. R. Co. v. Farmers' Shipping Ass'n (C. C. A. 10) 59 Fed. (2d) 657, 659; Updike Grain Co. v. Chicago & North Western Ry. Co. (C. C. A. 8) 35 Fed. (2d) 486, 487.

presumed to be the correct one, and this is particularly true where there has been a contemporaneous construction of the statute by those charged with its execution and application."

[fol. 326] In Pennell v. P. & R. Co., 231 U. S. 675, the question before the Supreme Court was whether the Safety appliance act required automatic couplers between the locomotive and the tender. The act made it unlawful for any common carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact." The court pointed out that the evidence showed that it was not the custom of railroads to use automatic couplers between the engine and tender. At page 680 of the opinion the court said:

"* * * the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

Respondent's proof, if it had been received, would have shown that all of the other stockyards companies, and all of the railroads serving them, as well as the commission, have for many years construed the Interstate commerce act as not applying to stockyard companies.

Whether upon the principle of practical construction or otherwise, the commission itself in many important cases has felt that an investigation of other situations similar to that before it would be helpful in reaching a decision as to the proper construction of the Interstate commerce act. In Star Grain and Lumber Co. v. A. T. & S. F. Ry. Co., 14 I. C. C. 364, 17 I. C. C. 338, the commission was required [fol. 327] to determine whether certain tap lines in the southwest were common carriers by railroad. As an aid in reaching a sound conclusion as to the status of the particular tap lines before it, the commission on its own motion made an investigation of the facts and circumstances respecting 740 tap lines in various parts of the country. With respect to this the commission said (17 I. C. C. 342-343):

"Few, if any, of the logging roads or so-called tap lines, however much they have endeavored to give themselves the

appearance of being common carriers, are in fact fairly to be considered as common carriers within the purview of the act. In the investigation made by the commission on its own initiative in aid of this record and other matters pending before us the facts in relation to some 740 tap lines in various parts of the country were gathered, either through responses made to our inquiries in the form of circular letters and otherwise, or through personal examinations made in the field by our examiners. The information thus acquired may be assumed to be generally accurate. It shows that of the 740 tap lines so investigated 183 have gone through the form of being incorporated as railroads; but 65 file with this commission tariffs applicable to interstate movements; only 50 tap lines concur in the interstate tariffs of regular carriers; 621 tap lines neither file tariffs of their own nor concur in tariffs of other lines covering interstate shipments; and but 92 file annual reports with this commission as required by law of common carriers engaged in interstate commerce. In the case of 498 of these tap lines our investigations disclose that the entire traffic is [fol. 328] supplied by the lumber interests by which, in one form or another, they are owned and controlled; but 33 lines receive as much as 20 per cent of their total tonnage from the public or industries other than the lumber mills by which they are directly or indirectly owned and controlled; and 200 tap lines are reported as receiving 80 per cent or more of their total tonnage from the lumber interests that control or own them, and in the majority of these instances our reports indicate that as much as 90 per cent of the traffic moved is lumber received from the mills by which they are owned or controlled."

Much of the evidence that respondent desired to introduce at the hearing in the present case was of the same character which the commission deemed important to have before it in determining whether particular tap lines were common carriers.

In Associated Jobbers of Los Angeles V. A. T. & S. F. Ry. Co., 18 I. C. C. 310, the question before the commission was whether a charge for spur-track delivery in the city of Los Angeles was contrary to the Interstate commerce act. In determining this question the commission looked at the practices at other points on the Pacific coast

and elsewhere, as is shown by the following quotation from page 314 of the report:

"There are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points. The theory justifying these lower rates is that water competition compels their maintenance, yet in only the three cities named is there such a charge for spur-track delivery, though in many of such places such [fol. 329] delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific, and Great Northern lines impose no such charge, and to the east where defendant lines have their termini in cities competing with Los Angeles, this charge is also unknown."

The order of the commission in this case was affirmed by the Supreme court in Los Angeles Switching Case, 234 U. S. 294, where at pages 307 and 308 the court referred to the findings of the commission with respect to the practice at points other than Los Angeles.

Another important case in which the commission received evidence of practices at points other than the one involved in the case before it is The New York Harbor Case, 47 I. C. C. 643, where a question was raised concerning the practice of disregarding the cost of a specific service in constructing rates for long hauls and including such cost in rates for shorter distances. At page 701 the commission discussed the evidence in the record at other points, saying:

"The practice of disregarding the cost of a specific service in constructing rates for long hauls, while including it in the rates for shorter distances, is such a common one that it may well be accepted as one of the established principles of rate making in this country. It is by no means unusual, as the present record shows, for carriers to absorb switching charges when the freight revenue is sufficient to warrant [fol. 330] it, and the absorption tariffs usually state the minimum revenue per car which the carrier prescribes in such cases."

Respondent on brief and at oral argument desires to point out the applicability of the foregoing principles to the present case. This it cannot do adequately without a factual basis for such argument. Grimmer v. Tenement House (N.

Y. ct. of appeals), 98 N. E. 332. Whatever the commission may think at first blush of the soundness of such a contention, it should not permit its examiner to prevent an effective presentation of the argument by refusing to receive evidence on the subject.

IX

The reasons why evidence concerning other yards was in order may be summarized:

(1) Such evidence would show that the remedial purposes of section 15(5) of the act have been carried out without supervision by the commission of any yard in the country except Chicago; that no hardship has been imposed on the railroads; and that live stock rates have not been increased because of the absence of such supervision.

(2) Such evidence would show that the Secretary of Agriculture has permitted other stockyards to publish their loading and unloading charges in tariffs filed with him, and that he would allow respondent to carry out its agreement with the commission that it would do likewise if held not to be a common carrier by railroad. This would remove [fol. 331] any fear that the trunk line railroads entering Chicago might be oppressed by respondent. Such evidence would also tend to substantiate respondent's argument that the Secretary has jurisdiction over loading and unloading charges in instances where the stockyard company performing such services is not subject to the jurisdiction of the commission.

(3) Such evidence would show the soundness of the dissenting opinion in I. & S. docket 4109, and would give respondent a factual basis for urging this on brief and in oral argument.

(4) Such evidence would permit respondent to explain and bring up to date in detail the evidence concerning loading and unloading services at other western yards introduced at the instance of protestants.

(5) Such evidence would show that the fact that most of the live stock at Chicago is handled through one yard is not peculiar to Chicago, but is inherent in the nature of the business, and that the same situation obtains at nearly every other central market. This would form a factual basis for respondent's argument that Chicago should not

be singled out for special treatment because of the so-called bottle-neck condition there existing. Such evidence would also show that, because of the nature of the business, not only respondent but every other stockyard company insists that its employees do the loading and unloading of live stock and that every stockyard company holds itself out to perform such service.

(6) Such evidence would show that the uniform practical construction given the Interstate commerce act by the com- [fol. 332] mission as well as by the stockyard companies and the railroads indicates clearly that respondent, since the Chicago Junction Railway Company leased its properties to the New York Central, is not within the purview of the act.

Respondent's case for the admission of this evidence is strengthened by the fact that it not only wants to introduce such evidence to make an affirmative showing of the propriety of the step it seeks to take (The New England Divisions Case, 261 U. S. 184, 200), but also in explanation or rebuttal of evidence introduced by the commission and protestants. Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 93.

No technical objections were raised as to the character of this evidence, the only objection being as to the materiality and relevancy. (Tr. 473-475) The Examiner, however, excluded it under his blanket ruling, and adhered to this ruling notwithstanding the fact that its relevancy and materiality were pointed out to him by counsel for respondent. (Tr. 462-464, 475-508, 515.)

X

In determining whether the Examiner's rulings should be sustained, it may be helpful to consider the commission's traditional liberality in admitting evidence. The commission is a fact-finding body and has never felt itself confined within narrow limits in seeking facts. In this position it [fol. 333] has repeatedly been sustained by the courts. Perhaps the best statement is found in Interstate Commerce Commission v. Baird, 194 U. S. 25, where the court said at page 44:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to

interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

See also Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 93; Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 131; Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271.

An examiner occupies the same relative position with respect to the commission as does a master in chancery with respect to a court of equity. It is an almost universal practice for masters in chancery to admit proffered evidence, subject, if necessary, to objection, unless there can be no doubt as to its impropriety. This practice has a sound basis for the reason that the reviewing court can disregard any evidence that it considers improper, but cannot make the record if the master errs on the side of excluding evidence. Very properly, examiners for the commission ordinarily follow the same practice as masters in chancery.

The Examiner's rulings in the present case are in striking contrast to the general policy of the commission and [fol. 334] examiners in admitting evidence. Not only did he exclude evidence concerning other yards, a subject which we heretofore discussed at length, but he pursued his rigid policy much further. He would not permit respondent's witness to testify (or even to qualify to testify) as to analogous situations, such as the handling of cotton at transit points, the handling of commodities by lighterage companies or by dock companies at ship-side (Tr. 555-557), or pick-up and delivery performed by truckers for the railroads. (Tr. 399-400.)

He allowed protestants and himself the widest latitude in going into the purposes and motives of respondent. (Tr. 139 et seq.) This was carried even so far as to inquiring whether respondent was sponsoring certain proposed legislation in congress (Tr. 149-150); what brought about the investigation in the valuation proceeding concerning respondent's stockyard now pending before the Secretary of Agriculture (Tr. 174-175); whether the Secretary has fixed the rates of respondent (Tr. 156-158); and whether respondent has been successful from its inception with practically no regulation by the Secretary of Agriculture. (Tr. 154-155.) He permitted protestants to introduce as an exhibit a small section of the cross-examintion of the government witness by respondent's counsel on rate of return in the

valuation proceeding before the Secretary of Agriculture[1] [fol. 335] (Tr. 160-161, Ex. 21); a reply to a protest filed in I. & S. docket 4244 to which reply respondent was not even a party (Tr. 98, 161-162, Ex. 22); and a draft of a proposed contract for additional compensation submitted to the railroads several years ago but never executed. (Tr. 139-140, 546, Ex. 30.)

The Examiner himself elicited information that one of the purposes of respondent in seeking to withdraw its tariffs was to increase its charges (Tr. 144-145); inquired about increases in yardage and other charges (Tr. 223); and allowed protestants to go into the question of increases in rates for ordinary stockyard services (Tr. 174-176); yet when respondent sought to explain this testimony by showing the recent decline in its revenue and its need for more income, the Examiner sustained an objection to such evidence when respondent refused to accept a condition imposed by the Examiner that it furnish information concerning the measure of respondent's yardage rates more than 20 years ago, which information the Examiner had previously held to be immaterial. (Tr. 333-336, 176.) The Examiner also declined to permit respondent to show the proportions of revenue derived from loading and unloading charges and from ordinary stockyard services except on the same condition. (Tr. 183-184.)

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[1] The purpose of this exhibit apparently was to bind respondent by the implications of questions put by its counsel in cross-examining a witness in another case. (Tr. 150-153) The admission of the exhibit was strikingly improper for several reasons: (1) any evidence concerning regulation of respondent by the Secretary of Agriculture (except evidence with respect to the regulation of loading and unloading charges, which the Examiner rejected) was immaterial to the issues in the case; (2) whether respondent has been successful with or without regulation by the Secretary was likewise immaterial; (3) whether regulation by the Secretary has been efficient was a matter primarily with which congress should be concerned; and (4) it would work untold hardship on the litigants for any tribunal to establish as a principle that they are bound by the implications of questions put by their counsel. This is particularly true in connection with cross-examination where counsel is given much latitude in both the form and substance of questions in testing the knowledge or conclusions of witnesses.

[fol. 336] Against the background of the commission's liberal policy in admitting evidence, the Examiner's erroneous rulings are sharply emphasized. These errors the commission should promptly correct, because, however much freedom the courts may allow the commission in the admission of evidence, they have never indicated that any such policy would be permitted in connection with the exclusion of evidence.

Thus in Chicago Junction Case, 264 U. S. 258, the Supreme Court said at page 265:

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."

In Morgan v. United States, 298 U. S. 468, the court discussed the "full hearing" required by the Packers and stockyards act and said at page 480:

"Facts and circumstances which ought to be considered must not be excluded."

XI

In fairness to the Examiner we call attention to the fact that he gave the denial of respondent's petition for rehearing in I. & S. docket 4109 (Ex. 16) as a reason for his ruling in regard to evidence concerning conditions at other yards.[1] [fol. 337] This disposes of any suggestion that the Examiner did not act in good faith, but it does not furnish a

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[1] It is possible that we may have misinterpreted the Examiner's statement. With respect to a tentative ruling given prior to the offer of certain tariffs and before the argument of the question of their admissibility he said: "• • • I have done it intentionally [i. e. ruled in advance] because I consider the commission has ruled on the general proposition already." (Tr. 368.) Questions directed to counsel by the Examiner at page 471 of the transcript tend to confirm our interpretation of the basis of his rulings. If the Examiner had in mind what the presiding commissioner had to say on the subject at the original hearing there is no purpose to this section of our brief; but the legal effect of the erroneous rulings of the Examiner is the same whether the responsibility is his or that of the commissioner. We also call attention to the fact that at other times the Examiner based his ruling on the less specific grounds of immateriality and irrelevancy. (Tr. 284, 515.)

sufficient reason for his failure to admit proper evidence, nor does it make his action any less a denial of a full and fair hearing.

Section 16a of the act provides in part:

"After a decision, order or requirement has been made by the commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the commission *in its discretion* to grant such a rehearing if sufficient reason therefor be made to appear." (Italics ours.)

The word "discretion" is broad and inclusive, and many things besides the question of relevancy or materiality of evidence may have influenced the commission's decision. The commission may have thought that respondent had not been diligent in presenting such evidence at the original hearing. See United States v. Northern Pacific Ry. Co., 288 U. S. 490, 494. It may have thought that the evidence proffered in the petition for rehearing would have been helpful but not determinative of the issues. It may have decided that since respondent had filed a bill of complaint in court it would let the courts struggle with the problem. Many other things may possibly have led the commission "in its discretion" to deny the petition.

We are not attempting in any way to suggest what factor led the commission or individual commissioners to vote [fol. 338] against the granting of the petition. Our point is that so long as the determining factor could have been something other than the immateriality or irrelevancy of the proffered evidence the Examiner had no right to assume that it was the latter. Legal principles must be applied to all alike, and respondent may insist with propriety that the legal significance given to the denial of a petition for rehearing should be the same in its case as in other cases. Unless, therefore, the commission is prepared to establish as a general principle that evidence tendered in a petition for rehearing which is denied is considered by it immaterial and irrelevant, it must overrule the Examiner.

Our own thought is that the commission will not want to limit in any such manner the effect of its exercise of discretion, but will say as the Supreme Court has said in an analogous situation:

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been

told many times." United States v. Carver, 260 U. S. 482, 490.

We may also mention other reasons why the action of the commission in the former case could not have the effect that the Examiner gave to it. Here the showing which respondent was prepared to make was much more comprehensive than that mentioned in the petition for rehearing in I. & S. docket 4109. (Ex. 16.) Unfortunately, because of the Examiner's ruling that exhibits which he considered improper could not be marked for identification nor specific offers of proof made, respondent cannot go into detail on [fol. 339] this subject. It may state generally, however, that it was prepared to show in addition to the facts mentioned in the petition for rehearing among others the following matters: (1) that all stockyards insist in doing the loading and unloading of live stock moving by rail; (2) that all stockyard companies at present hold, and have throughout their existence held, themselves out to perform this work for the railroads; (3) that the individual railroads generally treat all stockyards the same as Chicago in publishing line-haul rates to and from such markets; (4) and that all stockyards and all the railroads serving yards other than Chicago construe the Interstate commerce act as not applying to stockyards.

Moreover, in that petition respondent necessarily restricted its offer of new evidence to showing that the conclusions of the commission were wrong. There was no occasion for it to urge there that the showing should be permitted in order to enable it to rebut or explain evidence introduced at the request of protestants in the present case.

There is the additional reason that in the petition for rehearing I. & S. docket 4109 the emphasis was placed upon the value of such evidence for the purpose of showing the practical construction, and, although certain other reasons for the admission of such evidence were advanced, they were not urged with the same force as they were urged before the Examiner in the present case.

[fol. 340] XII

The Examiner, however, did not stop with refusing to permit respondent to prove material facts concerning other yards; he even refused to permit it to have marked for identification or to offer exhibits containing facts that he con-

sidered immaterial or to make offers to prove specific facts. This was done deliberately and consistently throughout the hearing.[1]

[fol. 341] Whether the Examiner was laboring under the mistaken impression that exhibits merely marked for identi-

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[1] The scope of the Examiner's rulings is shown by the following portions of the record:

Transcript 510-511:

"Mr. Gladson: And, Mr. Examiner, do I correctly understand you that your ruling is that you won't permit any evidence pertaining to facts and circumstances at these other stockyards; that is other posted stockyards?

"Examiner Carter: Yes, sir.

"Mr. Gladson: And am I correct also in my understanding that you won't permit us to mark any exhibits pertaining to these other yards for identification?

"Examiner Carter: That is correct.

"Mr. Gladson: Or that I won't be permitted to put questions to this witness concerning the facts and circumstances of these other yards and offer specific proof concerning such facts?

"Examiner Carter: That is true."

Transcript 527:

"Mr. Gladson: • • • I want to make my record as to what I want to prove so that when the commission or the courts get it they will know specifically what I expected to prove by this witness • • •.

"Examiner Carter: I am not going to permit the detailed offer of testimony which I have ruled is inadmissible.

"Mr. Gladson: And that includes—you are not going to permit, as I understand it—the marking of these specific exhibits and offering them in evidence? Am I correct in that understanding?

"Examiner Carter: "Yes, I think you can—that is my ruling.

"Mr. Gladson: And as far as the specific evidence which this witness is going to make orally in connection with these various stockyards, am I correct in my understanding that the Examiner will not permit that evidence to be developed in question and answer form?

"Examiner Carter: That is correct."

fication or offers of proof might somehow be treated as evidence without being admitted as evidence,[1] whether he felt bound to follow a similar ruling made as to an offer of proof by the commissioner who presided at the first hearing[2] (Tr. 82-83), or whether something else prompted him to take such action, does not appear in the record. But whatever may have been the reason, the effect was the same: To

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With reference to certain pages of Exhibit 24 for identification which showed rates to markets other than Chicago, the following colloquy is enlightening (Transcript 553):

"Mr. Gladson: * * * You don't mean by that, Mr. Examiner, that they will be physically removed from the file and be destroyed, or something of that sort?

"Examiner Carter: They will be physically removed from that exhibit and a notation made of what was physically removed.

"Mr. Smith: That is exactly what ought to be done with them. They ought to be taken out and thrown in the fire, if the Examiner please. * * *"

See also references to pages of the transcript recited in the footnote at page 4 of this petition.

[1] There are indications that the Examiner may have labored under this mistake. (Tr. 344.) See Byerley v. Sun Co., 181 Fed. 138, 142-143, wherein the court pointed out the fallacy of any such theory. See also Shelton v. Holzwasser, 91 N. Y. S. 328, 329, and Casteel v. Williams, 41 Ill. App. 61, 65-66.

[2] Apropos of the discussion at the first hearing on this subject the statement of the court in City Railways Company v. Carroll, 206 Ill. 318, 328-329, is enlightening:

"No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error.

deny to respondent the opportunity to have the Examiner's rulings reviewed by the commission or the courts.[3]

The soundness of this last statement is obvious: The commission or a court cannot determine whether the rejec- [fol. 342] tion of evidence by a lower tribunal or the Examiner was erroneous unless it knows what just evidence was rejected. In Herencia v. Guzman, 219 U. S. 44, the Supreme Court said at page 46:

"It is further insisted that the court erred in refusing to allow one Dr. Gonzales to testify. As to this the record merely sets forth that council 'offered to present the testimony of one Dr. Gonzales, as an expert, which testimony is not allowed by the court and to which ruling of the court counsel for defendant thereupon noted an exception.' Manifestly the judgment cannot be set aside because of this ruling, for it does not appear what testimony the witness was expected to give, or that he was qualified to give any."

In Packet Co. v. Clough, 20 Wall. 528, the Supreme Court said, beginning at page 542:

"The last assignment of error is the rejection of the deposition of Turner. Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who

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If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

[3] The Examiner must have understood that this would be the effect of his rulings because counsel for protestants, in objecting to respondent's offers of proof and discussing what happened at the first hearing, said: "• • • and the Commissioner has ruled that the Commission would not hear these detailed offers of proof that were simply designed to get into the record in another way a record which they desired to take to court." (Tr. 265.)

complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance [fol. 343] of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict."

The necessity and the concomitant right to have exhibits marked and the record show offers of proof is so uniformly and universally recognized that no federal court decisions have been found which pass squarely on the question of the right of a litigant in these respects, but the federal authorities which we have just quoted impliedly recognize such right, for otherwise the right to review would be ineffective.

Due perhaps to the relatively greater number of inexperienced judges that are found in the state courts, the appellate courts of some states have had occasion to pass directly on the right of a litigant to make offers of proof.

In Maxwell v. Habel, 92 Ill. App. 510, the court said at page 512:

"When no objection to a question is sustained and there is no statement of counsel as to what it is expected to prove by the witness, it is impossible for a reviewing court to tell whether there was error in sustaining the objection or not. It necessarily follows that it is error for the trial judge to refuse counsel an opportunity to state what he expects to prove by any particular question or series of questions."

[fol. 344] In Sellers v. State (Ala.) 61 Sou. 485, the court said at page 488:

"Here we do not know what answer the witness would have given to the question, and cannot say, therefore, whether it would be material to the issue; but our lack of information is not due to any failure or neglect on the part of defendant's counsel to attempt, by established methods,

to properly inform us and the court below, but to the action of the trial court in refusing to permit him to do so. In this the court was in error. * * * If the court feared that a statement from defendant's counsel as to what he expected to prove by the witness might improperly prejudice the jury, the court should have had the jury to retire, pending the hearing; but certainly the court should not have foreclosed the defendant's counsel of his right to be heard, and thereby rendered it impossible for a reviewing court to pass on the relevancy and competency of the testimony he offers to produce."

In Fidelity & Casualty Co. v. Weise, 80 Ill. App. 499, (reversed on other grounds in 182 Ill. 496) the court said at page 513:

"Counsel have the right to make an offer of proof, for the two-fold purpose of informing the court of what is expected to be proved, and of preserving an exception to the exclusion of the offered evidence, and there was no error in permitting the offer to be made."

In Spurlock v. State (Ala.) 82 Sou. 557, the court said at page 558:

"The action of the court in denying to defendant's counsel the right to state what he expected to show by the wit- [fol. 345] ness J. B. Spurlock was an invasion of the defendant's constitutional right to be heard by himself and counsel."

In Chicago & Alton R. R. Co. v. Fietsam, 123 Ill. 518, the Supreme Court of Illinois said at page 522:

"The practice is well settled, that a party has a right, when he has a witness on the stand, to offer to prove such facts as may be thought to be material to the case, and if the court rules that the evidence is incompetent, the offered evidence may be incorporated into a bill of exceptions, and the ruling may thus be reviewed on appeal or writ of error."

The Examiner, it is true, did offer to permit counsel for respondent to make "general observations" concerning and "state generally" what respondent proposed to prove (Tr. 257, 269-270), but forbade the making of offers of proof of

specific facts. (Tr. 257, 510-511, 527.) He stated that he would permit respondent's counsel to read "the title of the exhibits you have that you desire to offer in this connection" (Tr. 466), but refused to allow respondent to have the exhibits marked or to offer them in evidence. (Tr. 510-511-527.)

It is well settled, however, that an offer of proof must be specific, and that a general outline of proposed evidence is not sufficient. In 64 Corpus Juris, at pages 127-129, it is said:

"An offer of proof must be certain, intelligible, and must definitely state the facts sought to be proved, either by reference to the evidence proposed to be offered or to the facts [fol. 346] to be proved. * * * An offer must be specific enough to make its relevancy apparent. * * * The offer cannot be made in general terms, but must be so made as to give the court an opportunity to rule on the specific testimony, complaint of the exclusion of which is made, and must be so specific as to show the error of the court in refusing to admit it. A party is bound to know what his witness can say and to make the offer in such terms that the court has the assurance that if permitted to speak the witness will so testify. * * * It is not sufficient that the offer state the ultimate facts in language appropriate to a pleading. The evidentiary facts must be set out."

Elliott's General Practice states the rule as follows (p. 714):

"The offer should specifically state the facts which counsel expects to show in answer to the question propounded to the witness. This is necessary, where the objection is sustained, in order to enable the court to determine whether the testimony is competent, and to present any question on appeal."

In Central Pacific Railroad v. California, 162 U. S. 91, 117, the Supreme Court said:

"Offers of proof must be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matters, and made in good faith."

A general offer of evidence was held insufficient in Goodrich v. City of Chicago, 218 Ill. 18, where, in refusing to

[fol. 347] reverse the ruling of the trial court, the Supreme Court of Illinois said at page 23:

"The record on this point does not show that appellants offered any specific evidence which was competent upon the subject, but in a general way offered to prove the fact without submitting the proposed evidence • • •."

Every ruling made by an Examiner is subject to review by the commission and ultimately by the courts. Whatever may be said about the Examiner's discretion in admitting evidence or in conducting the hearing or in exercising control over the reporter, no one can seriously urge that he may use his authority to prevent such review and thereby make his own judgment final. If power exists to nullify or render ineffective legal rights of the parties, that power reposes in congress and not in an examiner. Although the commission should not be limited by the strict rules as to the admissibility of evidence prevailing in the courts, nevertheless the Supreme Court has said that the commission is required "to preserve the essential rules of evidence by which rights are asserted or defended." Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 93. One of these essential rules is the right of a litigant before the commission to make an offer of proof.[1]

[fol. 348] We submit that the Examiner's rulings in this respect were wholly arbitrary. The commission realizes that the courts will be asked to pass on the propriety of any ruling made by it in this case adverse to respondent. It should, therefore, in fairness to respondent take steps to undo what its Examiner has done to prevent respondent from making a complete record for the courts to review.

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[1] The fact that such an offer might have lengthened the hearing somewhat does not justify the Examiner's ruling. In Atchison Ry. Co. v. United States, 284 U. S. 248, 262, the court said:

"And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice. • • • In the discharge of its (i. e. the commission's) duty, a fair hearing is a fundamental requirement. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 91."

XIII

The reasons heretofore advanced in this petition form ample and sufficient grounds for the admission of the evidence that was rejected. Respondent believes that an examiner with an open mind on the subject would have admitted such evidence without question. That would have been the normal procedure in the ordinary case. The law requires an officer presiding at any hearing of the nature of the one with which we are concerned to receive all relevant and material evidence offered by any litigant regardless of how many times the subject may previously have been before the tribunal or regardless of the motives of the litigant. The law also requires that every litigant be given an opportunity to make its record for review. Respondent, therefore, cannot view with equanimity the treatment that it has been accorded.[1] It believes that justice requires that the commission set the case for further hearing and take such further steps as may be necessary to correct the errors of the Examiner.

[fol. 349]

XIV

Briefly stated the evidence which respondent was denied the right to offer would have shown the facts concerning the situation at all of the major stockyards of the country from their inception, including their construction, their corporate powers and relationships, their railroad facilities, their operations and operating arrangements, their locations, their economic status, the amount and character of business done by them, their contracts with the carriers who are protestants in this proceeding as well as with other carriers, and the fact that this commission and these protestants (with knowledge of the facts and conditions over the years) have elected to accord them regulation and/or treatment strikingly different from that accorded respondent despite

[1] The Director of the Bureau of Inquiry was present throughout the hearing. (Tr. 488.) Respondent does not deny that he has the right to attend any hearing he may desire, nor has it any knowledge that his official duties did not require him to be there. His presence, however, did not tend to allay respondent's feeling that it was not receiving the kind of a hearing to which it was entitled under the law.

the essentially similar conditions which the evidence would have disclosed.[1]

If a further hearing is granted respondent will present the evidence which it was prevented from introducing or offering by the Examiner.

It was originally the intention of respondent to submit to the commission at the time of filing this petition the exhibits which it was prepared to introduce at the former hearing, and also to submit a detailed statement of the facts that it sought to prove at that time. (Tr. 529.) The rules of practice of the commission, however, do not permit any such submission. Rule XV (b) provides:

[fol. 350] "If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the *nature and purpose* of the evidence to be adduced must be *briefly stated* and it must appear not to be merely cumulative." (Italics ours.)

In order to avoid the possibility of a denial of this petition on the ground of a non-compliance with the rule (National Wholesale Grocers' Ass'n v. Director General, 69 I. C. C. 669, 675), respondent has merely stated briefly the nature and purpose of the evidence which should have been received.[1] Respondent is prepared, if the commission so de-

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[1] The nature as well as the purposes of the rejected evidence is shown further at many other places in the petition.

[1] The Examiner offered to allow respondent to place private marks on the exhibits which he would not permit the reporter to mark for identification and to mail such exhibits to the commission with any petition which respondent might file. (Tr. 515, 525-528.) An examiner, however, has no authority to waive the rule of the commission quoted above. As was stated by the Supreme Court in Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, at pages 608 and 609, quoting from another decision:

" 'A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. • • • The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it.' "

See also Weil v. Neary, 278 U. S. 160, 169.

sires, to submit such exhibits and statement as an appendix to this petition or separately.

XV

The matters involved in this petition are of such importance that respondent desires to be heard orally by the full commission.

[fols. 351-352] Wherefore, respondent respectfully prays:

(1) That this proceeding be set for further hearing;

(2) That the examiner who may be assigned to hear the case be instructed to receive the evidence rejected at the hearing in Chicago, or such part thereof as the commission may deem material or relevant;

(3) That in any event respondent be given an opportunity at a further hearing before final submission to make offers of proof of specific facts in respect of any such evidence not received or deemed immaterial or irrelevant, including the opportunity to have exhibits marked for identification and to offer them in evidence; and

(4) That the commission grant such further relief in the premises as may be meet.

Respectfully submitted, Ralph M. Shaw, R. C. Fulbright, Guy A. Gladson, Bryce L. Hamilton, Attorneys for Petitioner.

1400 First National Bank Bldg.
September 7, 1937.

Oral argument is requested

[fols. 353-356] Served Nov. 17, 1937.

BEFORE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4296

Cancellation of Live Stock Services at Chicago.

ORDER DENYING PETITION FOR FURTHER HEARING ETC.—
November 8, 1937

Upon consideration of the record in the above-entitled proceeding and of respondent's petition dated September 7th, 1937, for further hearing before final submission:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission. W. P. Bartel, Secretary. (Seal.)

[fol. 357] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. No. 4296
Cancellation of Live Stock Services at Chicago

Exceptions of Respondent to Report Proposed by Examiner Paul O. Carter

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Statement

May it please the Commission:

The ultimate question presented to the commission in this case is whether respondent, The Union Stock Yard and Transit Company of Chicago, a public stockyard company which does not transport and has no facilities by which it could transport, is a common carrier by railroad merely because it performs the services of loading and unloading livestock at its stockyard for common carriers by railroad. Stated in other words, the commission is called upon to decide whether a company which does not carry persons or property from place to place and does not have the locomotives, cars and other necessary facilities for carriage is nevertheless a common carrier by railroad because it loads and unloads certain freight for persons and corporations which admittedly are engaged in common carriage by railroad.

[fol. 358] The proposed report treats this ultimate question as res judicata by reason of the decision of the commission in I. & S. 4109, Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330, where it was found that respondent was a common carrier by railroad. Except for a discussion of certain evidence which respondent attempted to have made a part of the record in the present case and a provision in a lease not mentioned in the report in I. & S. 4109, the examiner fails to discuss the issue in the light of the present record, but in effect recommends that the commission reaffirm its holding in that proceeding for the reasons stated in its report.

In its original brief in the present case respondent discussed the report and finding in I. & S. 4109 quite fully in the light of the present record, and, in order to avoid repetition, refers the commission to that brief for enlightenment

on the question of the soundness of its report in I. & S. 4109 and for a discussion of additional primary evidence submitted in the present proceeding. It earnestly requests the members of the commission to again read that brief.

For the reason stated, respondent will confine its present discussion largely to matters mentioned by the examiner in his proposed report and to certain citations supplementing its original brief.

[fol. 359] Exceptions and Argument

First Exception

Respondent excepts to the conclusion of the examiner in his proposed report that respondent is a common carrier by railroad subject to the Interstate commerce act.

Comment

Respondent is not at the present time a common carrier by railroad. It does not operate a railroad, and does not transport nor hold itself out to transport persons or property for hire. It has no locomotives or other rolling stock, and does not exercise any control over any person or corporation engaged in common carriage by railroad. A common carrier by railroad is "one who operates a railroad" and "undertakes for hire to transport from place to place the property of others who may choose to employ him." (See Dwight v. Brewster, 1 Pick. 50, 53 (Mass.); Propeller Niagara v. Cordes, 21 How. 7, 22; Wells Fargo & Co. v. Taylor, 254 U. S. 175, 187; United States v. Interstate Commerce Commission, 265 U. S. 292, 295; United States v. American Railway Express Co., 265 U. S. 425, 432-433; Washington v. Kuykendall, 275 U. S. 207, 211; and United States v. California, 297 U. S. 175, 182, cited on pp. 15-18 of respondent's brief.) Operation and physical transportation from place to place are indispensable elements of common carriage by railroad. There is no dissent from [fol. 360] these principles. (For a full discussion see respondent's brief, sec. I.) The Supreme Court in United States v. Union Stock Yard, 226 U. S. 286 (1912), did not depart from these principles, but held respondent was then a common carrier because its alter ego was operating a railroad. (Respondent's brief, sec. II.)

The business of respondent is that of maintaining and operating a public stockyard. The courts and the commission have often held that this is not common carriage. (Respondent's brief, sec. III.) Respondent loads and unloads live stock for the railroads; but one who performs an incidental transportation service for a common carrier is not by virtue of that fact himself a common carrier. The railroads, not respondent, hold themselves out by tariffs on file with the commission to transport for shippers live stock to and from respondent's stockyard. The loading and unloading services are part of the transportation which the railroads are required by section 15(5) of the act to render. The railroads hire respondent to perform the loading and unloading work for them just as they engage icing companies to ice cars. The law is settled that railroads may engage a non-carrier agency to perform incidental services which they are obligated under their published tariffs to render. (Respondent's brief, pp. 52, 58-59; see also cases cited on pages 47-51.) The Interstate commerce act applies to persons and corporations that are in fact common carriers, and not to agencies which such carriers may engage to perform incidental services. (Respondent's brief, pp. 13-14, 45-51.)

[fol. 361] In 1913 respondent granted, demised and leased all its railroad properties in perpetuity to The Chicago Junction Railway Company (herein called "Junction") under a lease which contained no defeasance clause. (Tr. 14; Ex. 3, p. 127.) In 1922 the Junction, with the approval of the commission in Chicago Junction Case 71 I. C. C. 631, 150 I. C. C. 32, leased its railroad properties, including its leasehold interest in the railroad properties leased to it by respondent, to The Chicago River and Indiana Railroad Company (herein called "River Road"), a wholly owned subsidiary of the New York Central, canceled its tariffs, and ceased to be an operating carrier. (Tr. 16-17, 23, 124, 325.) Since that time neither respondent nor the Junction has operated a railroad, or exercised any control whatsoever over the operation of a railroad, or carried persons or property. (Tr. 23-25, 124, 217-218, 229-230.) The decision in United States v. Union Stock Yard, supra, thereupon became inapplicable to respondent, because its alter ego no longer operated a railroad. Since the lease of respondent's railroad properties was in perpetuity and carried no defeasance clause, it cannot even be said that, under

Illinois law, respondent now owns a railroad, although that fact is legally immaterial. (Respondent's brief, pp. 18-19.) Since respondent does not at the present time operate any railroad directly or indirectly, and does not undertake for hire or otherwise to transport persons or property by railroad for the general public from place to place, it cannot be declared a common carrier by legislative or administra- [fol. 362] tive fiat. Washington v. Kuykendall, 275 U. S. 207, 211; Frost v. Railroad Commission, 271 U. S. 583, 592.

In addition to the authorities cited in respondent's opening brief, we direct the attention of the commission to the recent decision of the Supreme court in Escanaba & Lake Superior R. R. Co. v. United States, 82 Law. Ed. Adv. Ops. 568, approving a proposed pooling arrangement between the Milwaukee railroad and the Chicago & North Western. For many years the Milwaukee, under a trackage agreement with the Escanaba railroad, had operated trains of ore over the line of the Escanaba from Channing, Michigan to Escanaba, Michigan, and had operated the empty cars in the reverse direction. Under the pooling arrangement the Milwaukee's ore traffic would be routed over a line of the North Western. In answering the contention of the Escanaba that it was a "carrier involved" whose consent was required by section 5(1) of the Interstate commerce act, the court said (p. 571):

"Escanaba is not a carrier of the ore which is hauled between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; . . ."

The court thus held that the Escanaba, which owned the line used by the Milwaukee, was not a carrier of the ore handled under the trackage agreement. It follows from this decision that even if respondent still owns the railroad [fol. 363] properties granted, demised and leased by it in perpetuity to the Junction and later leased by the Junction to the River Road, respondent cannot be held to be a common carrier of live stock merely because it owns railroad properties operated by another carrier.

We also call the commission's attention to its decision in Wharfage, Handling, and Storage Charges, 59 I. C. C. 488. The city of Norfolk filed tariffs proposing to initiate

charges for wharfage, handling and storage at its municipal piers of property moving in interstate or foreign commerce by rail. The tracks at the piers extended to a connection with the Norfolk & Portsmouth Belt Line. This carrier operated over the municipal tracks, which it had leased from the city, and had filed a tariff establishing switching charges from, to and within these municipal terminals. In its report the commission said (p. 489):

"Respondent [the city] does not own or operate any rolling stock, and its only service in connection with transportation is the handling and storing of property at Norfolk. It admits that it is not a common carrier subject to the interstate commerce act, but maintains that its facilities may be used in connection with interstate and foreign commerce.

"We find that respondent is not a common carrier subject to the interstate commerce act, and that therefore the suspended schedules must be stricken from our files. If the line-haul carriers or the Belt desire to use the facilities of respondent in interstate or foreign commerce its storage [fol. 364] and other terminal charges should be published by them as provided in section 6 of the interstate commerce act, * * *."

Thus in this case a municipal corporation which owned a railroad and performed loading, unloading and other services included within the definition of "transportation" in section 1(3) of the act was held not a common carrier subject to the act, and its proposed tariffs were ordered stricken from the files of the commission.

Other cases, in addition to those cited in respondent's opening brief (pp. 52 and 59), which hold or recognize that agencies which perform services covered by railroad tariffs are not required to file tariffs are Lighterage Cases, 203 I. C. C. 481 (lighterage and car floatage); Storage in Transit at New Haven, 190 I. C. C. 209 (storage of goods in transit); Wharfage Charges at Atlantic and Gulf Ports, 157 I. C. C. 663 (wharfage, handling, storage and other accessorial services); and Rates on Cotton to Gulf Ports, 100 I. C. C. 159, 123 I. C. C. 685 (drayage, handling and wharfage).

The foregoing discussion is nothing more than a bare outline of our argument supplemented by a few additional citations of authorities. The decisions of the courts, with-

out exception, compel a decision that respondent at the present time is not a common carrier by railroad. (See respondent's brief, particularly secs. I-III.)

[fol. 365] Second Exception

Respondent excepts to the following statement on sheet 2 of the proposed report:

"The chief basis for the request for further hearing [i.e., the petition for rehearing, reconsideration and reargument filed by respondent in I. & S. 4109] was an offer to prove that the commission had not required the filing of loading or unloading tariffs by stockyard companies located at other points where the circumstances and conditions in connection with the loading and unloading services were alleged to be similar to those obtaining at petitioner's yard. Descriptions of the alleged conditions existing at a number of other stockyards were included in the petition. After consideration by the commission the petition was denied."

Comment

A copy of respondent's petition for rehearing, reconsideration and reargument in I. & S. 4109 appears in the record in the present case as Exhibit 16. Examination of the petition will show that its chief basis was not that stated by the examiner. The petition consisted of 25 pages. Section XII of the petition, consisting of six pages, was devoted to a request for further hearing to permit respondent to make the proof mentioned by the examiner for the purpose of showing that the practical construction of the Interstate commerce act by the commission had been that it was not applicable to services or charges for loading or unloading live stock at public stockyards other than Chicago. The ex-
[fol. 366] aminer's statement is misleading in that it fails to state the purpose of respondent's desire in I. & S. 4109 to prove the facts he mentions.

Moreover, other important reasons were urged as grounds for rehearing, reconsideration and reargument. Issue was taken in the petition with the reasoning of the commission in its report in I. & S. 4109 and its failure to make the proper findings. (Ex. 16, secs. I-XI.) Throughout the petition respondent asked for a rehearing in order that it might have an opportunity to prove facts, among others those pertaining to other stockyards, for the purpose of rebutting state-

ments and conclusions of the commission in that report. (Ex. 16, secs. VII, VIII, IX, XIII.) Respondent also requested reargument because only two of the commissioners who participated in rendering the decision had heard the oral argument. (Ex. 16, sec. XI.)

The examiner's statement implies that the commission, by denying respondent's petition in I. & S. 4109, passed upon the competency of the evidence which respondent sought to introduce. Section 16a of the act provides that the commission "in its discretion" may grant a rehearing. In denying the petition, the commission may have been influenced by other considerations besides the question of the relevancy or materiality of the proposed evidence mentioned in the petition. It is conceivable that the commission denied the petition because it felt that respondent had not been diligent in presenting the evidence at the original hearing. It may have deemed the proposed evidence helpful but not determinative. Since respondent had filed a bill of com- [fol. 367] plaint in the federal court at Chicago, the commission may have felt that it should exercise its discretion and deny the petition for rehearing for that reason. Many other reasons may have led to the denial of that petition. Since the order of denial did not state the reason for the action, and since that reason may very well have been something other than the competency of the evidence proffered with respect to other stockyards, the examiner had no right to leave the implication in his proposed report in the present case that respondent's petition for rehearing, reconsideration and reargument in I. & S. 4109 was denied because the commission deemed evidence with respect to circumstances and conditions at other stockyards irrelevant and immaterial. (See respondent's petition for further hearing in the case at bar, sec. XI.)

Third Exception

Respondent excepts to the following statement on sheet 4 of the proposed report:

"The evidence introduced by the Yard Company in this proceeding is essentially the same as that introduced in Investigation and Suspension Docket No. 4109, and consisted of detailed evidence relating to the history of the Yard Company and its operations, and descriptions of the services of loading and unloading livestock."

Comment

The evidence introduced by respondent in the present proceeding is not essentially the same as that introduced in I. & S. 4109. Many facts which were not in evidence in [fol. 368] I. & S. 4109 are in the present record. They were introduced to show that conclusions of the commission in I. & S. 4109 were wrong. Most of the additional evidence is mentioned or discussed in respondent's brief, and the commission is referred to that brief for showing as to the fallacy of the examiner's statement. (Respondent's brief, pp. 3-12, 53-63, 69-75, 77-79, 95-125.) It would unduly lengthen these exceptions to repeat what we have stated at length in our opening brief.

Fourth Exception

Respondent excepts to the following statement on sheets 4 and 5 of the proposed report:

"In addition to the evidence described above, respondent attempted to have made a part of the record evidence relating to the circumstances and conditions at stock yards located at points other than Chicago. In this connection it sought to introduce evidence purporting to show the facts concerning the situations at all the major stock yards in the United States, including their construction, their corporate powers and relationships, their railroad facilities, their operations and operating arrangements, their locations and economic status, the amount and character of their business and their contracts with railroad companies. They also attempted to introduce evidence purporting to show that the treatment accorded other stock yard companies by the commission has been different than that accorded respondent; that all stock yard companies insist upon the performance by its own employees of the loading and unloading of livestock transported by rail; and that all stock yard com- [fol. 369] panies hold, and have throughout their existence held themselves out to perform the loading and unloading services for the railroads."

Comment

This is a brief but not a complete statement of the general character of the evidence which respondent sought to introduce, but it does not in any way indicate to the com-

mission the purposes for which respondent offered to prove even the facts mentioned. This subject was comprehensively covered in respondent's petition for further hearing before final submission in the present case, which the commission is respectfully requested to examine.

In addition to evidence of the character mentioned by the examiner, respondent sought to show that there are approximately 135 other public stockyards in the country subject to the jurisdiction of the secretary of agriculture which perform loading and unloading services and are paid therefor by the railroads; that the facilities and services of the other public stockyards are similar to those of respondent at Chicago; that in many instances intercorporate relationships exist between the stockyard companies and the railroads serving them; that the commission over the years has obtained knowledge of the circumstances and conditions at many public stockyards and was aware of their similarity with the circumstances and conditions at respondent's stockyard; that the commission has never required any other public stockyard company to file tariffs with it covering loading and unloading services performed for railroads; that many public stockyards publish their loading and un- [fol. 370] loading charges with the secretary of agriculture; that at public stockyards which publish their loading and unloading charges in schedules on file with the secretary of agriculture the railroads, including the protestant carriers, pay these tariff charges without question; that many public stockyards perform loading and unloading for the railroads under contracts; that the protestant carriers have voluntarily entered into contracts for loading and unloading from time to time with public stockyards where circumstances and conditions are essentially similar to those at Chicago; that even though the railroads engage public stockyard companies throughout the country to perform loading and unloading, there have been no substantial controversies over the charges except in several instances; that at public stockyards where so-called barter-and-trade methods of fixing the charges obtain the railroads have been able to agree with the stockyard companies on the amount of the charge without hardship to the railroads and without increasing their line-haul rates to the shipper; that the protestant carriers themselves do not treat other public stockyards as common carriers; that the railroads throughout the country generally treat all stockyards the same way that the re-

spondent is treated by the Chicago carriers in publishing line-haul rates to and from the stockyards; that the so-called "bottle neck" condition obtaining at Chicago also obtains at nearly every other public stockyard in the United States, and that one stockyard company in each community handles the bulk of the business; that nearly all public stockyards [fol. 371] have a practical monopoly; that the reason all public stockyard companies have always insisted upon performing the loading and unloading services is because there would be endless confusion, slowing up of operations and inefficiency if the railroads were permitted to perform them; that the commission itself and all the other stockyard companies and all the railroads serving them have for many years by practical construction construed the Interstate commerce act as not applicable to stockyard companies; and that in analogous situations, such as the handling of cotton at transit points, the handling of freight by lighterage companies and dock companies at ship-side, and pick-up and delivery performed by truckers for railroads, the commission has never required the persons or companies performing the services for the railroads to file tariffs with it. (Respondent's petition for further hearing, pp. 6-8, 10-14, 20, 23, 27-28, 36; Tr. 245-248, 254-256, 262-264, 266-273, 343-346, 368-369, 399-400, 423, 456-506, 509-510, 549-550, 555-557.)

The foregoing evidence was designed particularly to rebut the conclusions reached by the commission in its report in I. & S. 4109, a copy of which was introduced as evidence in the present record as Exhibit 1 by the commission. The more important reasons why evidence concerning other yards should have been received may be summarized:

(1) It would have shown that the remedial purposes of section 15 (5) of the act have been carried out without regulation by the commission of any stockyard in the country except Chicago; that no hardship has been imposed on the [fol. 372] railroads; and that rates on live stock have not been increased by reason of the absence of such regulation.

(2) It would have shown that the secretary of agriculture has permitted other public stockyards to publish their loading and unloading charges in tariffs filed with him, and that he would allow respondent to carry out the assurance given by it to the commission that it would do likewise if held not

to be a common carrier by railroad; would have removed any fear that the trunk-line railroads serving Chicago might be oppressed by respondent; and would have tended to substantiate respondent's contention that the secretary of agriculture has jurisdiction over loading and unloading charges in instances where the stockyard companies performing the services are not in fact common carriers by railroads.

(3) It would show the soundness of the dissenting opinion of commissioner Meyer in I. & S. 4109, and would have given respondent a factual basis for urging this in its brief and in these exceptions.

(4) It would have permitted respondent to explain and bring up to date in detail evidence concerning loading and unloading services at various western stockyards introduced at the instance of the protestant carriers.

(5) It would have shown that the fact that most of the live stock shipped to Chicago moves through respondent's yard is not a circumstance peculiar to Chicago, but is inherent in the nature of the live stock business, and that the same situation now obtains at nearly every public stockyard in the United States.

[fol. 373] (6) It would have formed a factual basis for respondent's contention that it should not have been singled out for special treatment because of the so-called "bottle neck" condition obtaining at Chicago.

(7) It would have shown that, due to the nature of the business, not only respondent but every public stockyard in the country insists upon performing the loading and unloading services, and that every public stockyard holds itself out to perform those services.

(8) It would have shown that the uniform practical construction of the Interstate commerce act by the commission, by public stockyard companies throughout the country, and by the railroads has been that the act is not applicable to public stockyard companies—even those affiliated with railroads—which perform loading and unloading services for railroads.

Respondent's case for the admission of this evidence is strengthened by the fact that it not only wanted to introduce such evidence to make an affirmative showing of the propriety of the step it sought to take (The New England Divisions Case, 261 U. S. 184, 200), but also in explanation or rebuttal of evidence introduced by the commission and protes-

tants. Morgan v. United States, 82 Law Ed. Adv. Ops. 757, 760-761; Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 93.

No technical objections were raised as to the character of this evidence, the only objection being as to the materiality and relevancy. (Tr. 473-475.) The examiner, however, excluded it under his blanket ruling, and adhered to [fol. 374] this ruling notwithstanding the fact that its relevancy and materiality were pointed out to him from time to time by counsel for respondent. (Tr. 462-464, 475-508, 515.) The examiner's refusal to admit this evidence was erroneous, and his conduct in that respect highly arbitrary and unreasonable. (See respondent's petition for further hearing.)

Fifth Exception

Respondent excepts to the following statement on sheet 5 of the proposed report:

"The Yard Company then offered to prove in the exact form in which the evidence was originally offered the facts held by the examiner to be inadmissible. The offer of proof in this form were objected to. The objections were sustained by the examiner but the Yard Company was afforded the opportunity of describing in the record the character of the evidence sought to be introduced and what it purported to show. The Yard Company availed itself of this opportunity and the general character of the evidence held inadmissible by the examiner is described in the record."

Comment

The first sentence of the statement would seem to indicate that respondent "originally offered the facts," that the examiner held them to be inadmissible, and that respondent then offered to prove the facts "in the exact form" in which they were originally offered. This is not the case. Respondent, except in a few instances, was not permitted in its questioning to proceed far enough to indicate specifically the [fol. 375] evidence which it wanted to prove or to make specific offers of proof, and was not even permitted to have exhibits marked for identification. (See e g., Tr. 246-249, 257, 269, 459, 466-467, 510-511, 527; also see respondent's petition for further hearing, secs. II and XII.) The examiner thus in many instances ruled on proposed evidence

without knowing specifically what it was. At times the mere suggestion of facts pertaining to other yards was sufficient to invoke a ruling from the examiner that such evidence was inadmissible. (Tr. 344, 368, 459.)

Apparently the examiner has become somewhat apprehensive as to the propriety of his denial of a well-settled right to make specific offers of proof. This is the only reasonable explanation of his statement that respondent "availed itself" of the so-called opportunity offered by him to describe in the record "the character of the evidence sought to be introduced and what it purported to show." The fact is that the examiner, in effect, informed counsel for respondent that they would have to be content with the so-called opportunity he held out or nothing. (Tr. 461-467.) Counsel for respondent, without waiving their objection to the examiner's denial of respondent's well established legal right to make specific offers of proof, described in a general way the nature of a small portion of the testimony and exhibits they wished to present and the purpose of the evidence. (Tr. 467-506.) Due to the erroneous rulings of the examiner, respondent through its counsel was forced, over repeated objections, to take the only course permitted by [fol. 376] the examiner, and they did so without waiving respondent's right to make specific offers of proof.

For a full discussion of the highly arbitrary manner in which the examiner conducted the hearing the commission is referred to respondent's petition for further hearing before final submission and to the entire record. The commission should not help the examiner justify his unprecedented conduct by adopting the findings which he recommends.

Sixth Exception

Respondent excepts to the following statement on sheet 6 of the proposed report:

"The facts with respect to the services performed by the Yard Company in connection with the loading and unloading of livestock, the circumstances under which such services are performed and other pertinent facts are stated in the report of the commission in Livestock Loaded and Unloaded at Chicago, supra. There is no contention that such facts and circumstances differ in any respect from those existing when the decision in the above proceeding was made. No useful purpose would be served by a recitation

again of those facts or by a repetition of the reasoning by which the commission concluded that the Yard Company is a common carrier subject to the act."

Comment

Respondent is entitled to a decision on the record in the present case. Many of the statements and conclusions in the report in I. & S. 4109 were shown to be incorrect. Many facts not contained in the record in I. & S. 4109 are shown [fol. 377] in the present record and discussed in respondent's brief in the present case. The errors in the reasoning of the commission in I. & S. 4109 were pointed out in that brief. The commission is referred particularly to sections IV to IX of respondent's brief for a discussion of these matters.

Seventh Exception

Respondent excepts to the conclusion of the examiner in his proposed report that the ultimate issue in this case is res judicata.

Comment

Although the examiner does not expressly so state, the conclusion to be drawn from comments and discussion on sheets 2, 3, 4 and 6 of the proposed report is that the examiner was of the opinion that the ultimate question in this case is res judicata by reason of the decision of the commission in I. & S. 4109. It is well settled that decisions of the commission and its past findings of fact are not res judicata. Tagg Bros. v. United States, 280 U. S. 420, 445; Youngstown Sheet & Tube Co. v. United States, 7 F. Supp. 33, 36. The doctrine of stare decisis does not apply to the commission. Glen Falls Portland Cement Co. v. Delaware & Hudson Co., 55 Fed. (2d) 971,982. Wherever new facts are brought to the attention of the commission and a new record is made, or wherever it is shown that the commission has previously proceeded upon a misconception or misapprehension of the law or of any material facts, its previous findings are in no sense res judicata. Des Moines Board of Trade v. Des [fol. 378] Moines & C. I. R. R., 102 I. C. C. 186, 191-192; Sengel Motor Co. v. K. C. S. Ry. Co., 151 I. C. C. 170, 174; Central Commercial Co. v. Atchison, T. & S. F. Ry. Co., 152 I. C. C. 409; Warner v. Alabama G. S. Ry. Co., 173 I. C. C. 332, 333; Accounting for Capital Items, 201 I. C. C. 645, 668-669.

Eighth Exception

Respondent excepts to the following statement on sheet 7 of the proposed report:

"Under the terms of that [1922] lease, however, the Yard Company covenants that at any time it may be called upon by its lessees to do so it will exercise its charter powers as a railroad to condemn any lands needed in connection with the operation of the leased property and that it will keep alive its charter powers as a railroad during the term of the lease in order to preserve its powers of eminent domain. It thus appears that the Yard Company has obligated itself to preserve its status as a common carrier by railroad."

Comment

Respondent was not a lessor in the 1922 lease. In 1913 it granted, demised and leased unto the Junction in perpetuity all its railroad properties except a few industrial sidetracks used in taking delivery of freight consigned to it. (Ex. 3, pp. 127-129; Tr. 177-182; Ex. 36.) The Junction—not respondent—leased the properties covered by the 1922 lease. (Ex. 3, pp. 4-8.) Respondent merely consented to and ratified the lease. (Ex. 3, p. 37.)

[fol. 379] It is doubtful whether respondent has any charter power to condemn property. Its charter provides that it may condemn land "necessary for the railroad tracks herein permitted to be constructed * * * in the manner provided for in the 'Act to amend the law condemning the right of way for purposes of internal improvement,' approved June 22, A. D. 1852, and the acts amendatory thereof." (Ex. 2, sec. 4.) The act of 1852 (Ill. Laws 1852, p. 146) was amended in 1853 and again in 1869. (Ill. Laws 1853, p. 201; Ill. Laws 1869, p. 373.) In 1872 the Illinois legislature enacted a new eminent domain act which expressly repealed all previous conflicting laws except those enacted by the legislature in 1872. (Ill. Rev. Stat. 1937, c. 47, sec. 16.) Furthermore, the only railroad tracks which respondent's charter "permitted to be constructed" are tracks located outside the city of Chicago (Ex. 2, secs. 2 and 3), and the legislature further provided that nothing in respondent's charter "shall be deemed, taken or construed as conferring upon the company hereby created, any powers or authority to maintain or operate a railroad for

the conveyance of passengers or freight in the city of Chicago." (Ex. 2, sec. 11.) At the present time all of respondent's properties and all of the properties granted, demised and leased by it in perpetuity to the Junction are located in the city of Chicago. (Tr. 6; Ex. 3, p. 129.)

Respondent's charter powers are not determinative of the question whether it is or is not a common carrier, as the Supreme court has held in three cases discussed on pages 36 to 38 of respondent's brief: Terminal Taxicab Co. v. [fol. 380] District of Columbia, 241 U. S. 252, 253-254; United States v. Brooklyn Terminal, 249 U. S. 296, 304; United States v. California, 297 U. S. 175, 181.

The commission has also so held in two cases cited on page 38 of that brief. In one of these cases, Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, it was said (p. 230):

"The status of a common carrier is determined by its actions and not be reference to authority conferred in articles of incorporation. United States v. Brooklyn Terminal 249 U. S. 296."

In the other case, Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134, the commission said (p. 195):

"The Commission is a creature of statute, and its authority is derived from the act creating it. New England Divisions, 62 I. C. C. 513, affirmed, New England Divisions Case, 261 U. S. 184. Its jurisdiction is strictly statutory, and cannot be extended by implication over other subjects than those which the act defines. In Re Express Companies, 1 I. C. C. 349. The function and jurisdiction of the Commission is the regulation of commerce and not the regulation of railroads, except insofar as they are instruments of commerce. Philadelphia & R. Ry. Co. v. United States, 219 Fed. 988. *The application of the act and the jurisdiction of the Commission cannot be limited or expanded by the provisions of a carrier's charter.* State of Colorado v. United States, 271 U. S. 153." (Italics ours.)

[fol. 381] The mere fact that a corporation may have authority to condemn land for railroad purposes does not make it a common carrier within the meaning of the Interstate commerce act. The record indicates that respondent has never exercised any power to condemn land. (Tr. 113.)

To paraphrase language of the commission quoted above from Propriety of Operating Practices—New York Warehousing, the application of the Interstate commerce act to respondent and the jurisdiction of the commission over respondent's activities cannot be expanded by the provisions of respondent's charter. It obviously follows that the application of the act and the jurisdiction of the commission cannot be enlarged by any covenant which respondent has made to exercise powers given by its charter. So long as respondent does not undertake for hire to transport persons or property by rail from place to place for the general public it is not a common carrier by railroad subject to the jurisdiction of the commission.

The pertinent portion of the covenant referred to by the examiner reads as follows:

"If * * * the River Company shall require or desire any additional lands or other properties for railroad purposes identified with the use and occupation of the premises and properties herein demised, which, for any reason whatever, under and by virtue of the terms of its own charter, it may not condemn and which either the Junction Company or the Yard Company may, under the terms of its charter, condemn, then, in such case, the appropriate [fol. 382] party agrees that it will at the request of the River Company, and upon receiving the amount of money required for such purpose including litigation expenses, exercise its powers of condemnation with respect to any such land or lands, and upon the acquisition thereof convey or otherwise deliver the same as may be appropriate to the River Company, * * *." (Ex. 3, p. 23.)

Thus respondent is under no obligation to exercise its power to condemn land if the River Road under its charter has authority to condemn such land. The River Road, which now operates as a common carrier the railroad and properties formerly owned by respondent and those owned by the Junction, was incorporated in 1904 under the general incorporation act of Illinois relating to railroads (28 Val. Rep. 840, 846), and has ample authority under that act to condemn any property it may hereafter need. (Ill. Rev. Stats. 1937, c. 114, sec. 18, and c. 47, sec. 2.) These statutory provisions are part of the River Road's charter. People v. Chicago Gas Trust Co., 130 Ill. 268, 285; City of Danville

v. Danville Water Co., 178 Ill. 299, 306; Union Traction Co. v. City of Chicago, 199 Ill. 484, 539-540; Jones v. St. Louis Structural Steel Co., 267 Ill. App. 576, 579; Streator Aqueduct Co. v. Smith, 295 Fed. 385, 393.

Furthermore, the covenant expressly provides that if respondent acquires additional lands by condemnation at the request of the River Road it shall convey or otherwise deliver them to the River Road. Respondent did not agree to operate the properties. It could not operate a railroad [fol. 383] or engage in common carriage without first obtaining a certificate of public convenience and necessity from the commission.

The examiner seems to think that the mere existence of a right in a company to exercise the power of eminent domain is conclusive evidence that the company is a common carrier. The power to condemn land is a privilege which a state is free to give or withhold, and a state may grant it to a corporation organized to construct a railroad even though it has never operated and does not intend to operate. Elliott on Railroads (3rd Ed.), secs. 1185, 1186, 1194, 1195; St. Louis Connecting R. R. Co. v. Blumberg, 325 Ill. 387, 395. In Illinois, it is given to union depot companies which merely provide tracks and facilities for use by common carriers by railroad. (Ill. Rev. Stat. 1937, c. 114, secs. 175, 178, 180.) At most, the existence of a right to exercise the power of eminent domain is a circumstance which may aid in determining whether a person or corporation engaged in transporting persons or property is a common or a private carrier. Tap Line Cases, 234 U. S. 1, 26.

Respondent, in the covenant in question, merely agreed that, under the conditions stated, it would exercise only such authority to condemn as it might have under its charter in order to provide additional lands for railroad purposes for use by the River Road and not by respondent. The conclusion of the examiner that by reason of the covenant in question "the Yard Company has obligated itself to preserve its status as a common carrier by railroad" is wholly unwarranted by the language of the covenant; but [fol. 384] even if the covenant had the effect ascribed to it by the examiner, obviously a mere agreement by a company to preserve its status as a common carrier by railroad would not have the effect of preserving the status unless it actually transported persons or property by rail for hire from place to place for such persons as chose to engage its

services. (See Tap Line Cases, 234 U. S. 1, 26, and cases cited on pp. 15-18 of respondent's brief.)

Ninth Exception

Respondent excepts to the following statement on sheet 7 of the proposed report:

"The only change of substance caused by the lease of 1922, so far as the Yard Company is concerned, was to increase the rental it received from the lease of its railroad facilities."

Comment

The 1922 lease did not cause or result in any increase in the rental received by respondent. That lease provides—

"* * * that the River Company shall be entitled to deduct from each quarterly installment a pro-rata amount sufficient to aggregate each year the amount of rent payable for such year under said indenture of lease dated December 1, 1913, and supplements thereto, made between the Yard Company and the Junction Company, which is now the sum of Six hundred twenty-six thousand and forty-nine Dollars ($626,049) and thereupon to pay directly to the Yard Company, on behalf of the Junction Company, the [fol. 385] several installments of rent in said last mentioned leases reserved as and when they shall severally fall due." (Ex. 3, p. 11.)

The lease of December 1, 1913 from respondent to the Junction provided for an annual rental of $600,000. (Ex. 3, p. 132.) By supplemental agreements dated April 1, 1916, October 1, 1916, and January 1, 1918, certain additional properties were leased by respondent in perpetuity to the Junction at an aggregate annual rental of $26,049. (Ex. 3, pp. 161, 165, 174, 176, 180, 187.) Thus the rental paid by the Junction to respondent prior to the execution of the 1922 lease was $626,049, and the 1922 lease merely provided that the River Road might pay this rental directly to respondent on behalf of the Junction.

A vital change in the status of respondent resulted from the execution of the 1922 lease pursuant to the approval of the commission. After the execution of that lease, the Junction canceled its tariffs, ceased to be a common carrier, and became a non-operating railroad corporation. The

result was that respondent's alter ego ceased engaging in transportation, and that respondent was no longer directly or indirectly associated or affiliated with a company engaged in transportation by railroad. Thus the basis for the decision of the Supreme court in United States v. Union Stock Yard, 226 U. S. 286 (1912), ceased to exist. (See respondent's brief, sec. II.)

[fol. 386] Tenth Exception

Respondent excepts to the following statements on sheet 7 of the proposed report:

"The commission should find that the Yard Company in the performance of the services of loading and unloading livestock at Union Stock Yards, Chicago, is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with it covering its loading and unloading charges.

"The commission should further find that the suspended schedules are not justified. An order should be entered requiring cancellation of the suspended schedules and discontinuing this proceeding."

Comment

For reasons stated in respondent's brief and in these exceptions the commission should find that respondent in the performance of the services of loading and unloading live stock at its stockyard in Chicago is not a common carrier subject to the Interstate commerce act; that respondent is not a common carrier by railroad or otherwise; that respondent is not required to file tariffs with the commission covering its loading and unloading charges or any other rates or charges; and that the suspended schedules have been justified and should be permitted to become effective. The commission should enter an order vacating its order of suspension and discontinuing this proceeding.

[fol. 387] Eleventh Exception

The examiner erred in failing to make necessary findings, including findings of the following facts shown of record:

1. Respondent does not operate a railroad, and does not own or operate or exercise any control over any cars, locomotives or other railroad rolling stock. (Tr. 25.)

2. Respondent does not transport persons or property from place to place by rail or otherwise. (Tr. 25.)

3. Respondent does not hold itself out or undertake, for hire or otherwise, to transport persons or property from place to place by rail or otherwise; and does not own or operate the facilities necessary for such transportation. (Tr. 23, 25.)

4. Respondent is not directly or indirectly associated with or controlled by any common carrier by railroad. (Tr. 24-25.)

5. Respondent has no interest, direct or indirect, in any common carrier. (Tr. 24-25.)

6. Respondent does not directly or indirectly control any common carrier by railroad. (Tr. 24-25.)

7. Respondent is not affiliated with nor controlled directly or indirectly by any person, firm or corporation who or which either directly or indirectly controls or operates any common carrier by railroad. (Tr. 24-25, 217-218, 229-230.)

8. Respondent does not share in the profits of any common carrier by railroad. (Tr. 14, 125; Ex. 3.)

[fol. 388] 9. Respondent's railroad properties, except certain industrial tracks used by it in taking delivery of freight consigned to it, were granted, demised and leased in perpetuity to The Chicago Junction Railway Company, with the authorization and approval of the commission, under a lease which contains no defeasance clause or other provision by which respondent can obtain possession or control of the properties prior to the end of perpetuity. (Tr. 16, 178-182; Ex. 3, pp. 127-137; Ex. 36.)

10. Upon the execution of the lease of May 19, 1922, The Chicago Junction Railway Company ceased operation of its railroad properties and those granted, demised and leased to it in perpetuity by respondent, and since that time has not operated any railroad or engaged in the transportation of persons or property, and has had no tariffs on file with the commission. (Tr. 23, 124, 325.)

11. The railroad properties of The Chicago Junction Railway Company and those leased to it in perpetuity by re-

spondent have been operated since May 19, 1922, and are still operated, by The Chicago River and Indiana Railroad Company, a wholly owned subsidiary of The New York Central Railroad Company. (Tr. 17-19.)

12. In operating the said properties and in its tariffs the River Road uses the name "Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)." The name "Chicago Junction Railway" is merely a trade name used by the River Road, the corporate name of the Junction being "The Chicago Junction Railway Company." (Tr. 17-19, 352, 378; Ex. 3, pp. 1, 3; see also Sperry's [fol. 389] I. C. C. Nos. 329 and 339, which are a part of Ex. 24.)

13. The purposes of section 15(5) of the Interstate commerce act can be effectively carried out by the jurisdiction of the commission over the line-haul carriers. (Respondent's brief, pp. 39-43.)

14. The services of loading and unloading live stock at respondent's yard (irrespective of the legal aspects thereof) are in their nature stockyard and not railroad services. (Respondent's brief, pp. 52-57; Tr. 101-105; 569-606; Exs. 32 and 33.)

15. Respondent insists upon performing the loading and unloading services itself (a) because the services are essentially stockyard services or are incidental to the rendering of stockyard services; (b) because inbound shipments must be unloaded immediately due to the perishable nature of the commodity and in order to prevent delay to following trains; (c) because the railroads, as a practical matter, could not perform the services efficiently; (d) because respondent could not properly serve its non-railroad patrons if it permitted the railroads to do the loading and unloading; (e) because the work requires men long trained in the handing of all kinds of live stock, and respondent has and the railroads do not have such personnel; (f) because divided responsibility would result in an interference with the even and efficient flow of traffic essential to the successful operation of a live stock market; and (g) because of other practical objections, such as wage scales and working conditions, which would make it inadvisable for respondent to permit

[fol. 390] the railroads to do the work on its property. (Respondent's brief, pp. 52-57; Tr. 101-105.)*

16. The railroads do not deliver possession of cars of live stock to respondent. They handle both empty and loaded trains with their own engines and crews to and from the platforms of respondent, and these trains do not come upon the property of respondent and it exercises no control over them. (Respondent's brief, p. 70; Tr. 25, 41, 116.)

17. Respondent does not issue waybills or bills of lading, and its name does not appear on bills of lading or waybills as a participating carrier. (Tr. 282-283, 302.)

18. Respondent is listed in the tariffs of the railroads serving Chicago as an industry operating a stockyard, and its stockyard is shown therein as a station on the line of the Junction. (Respondent's brief, p. 74; Tr. 352, 353; see

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* In Adams v. Mellon, 51 Fed. (2d) 620, the Circuit Court of Appeals for the Seventh Circuit, referring to respondent prior to the 1922 lease, discussed this subject, saying (p. 625):

"There is significance in the fact that the government, in taking over the transportation facilities, did not take over the stockyard. It is quite likely that this branch of the transportation was deemed in its nature quite separable from the rest, and that this highly specialized service had best continue to be carried on wholly by this agency of proved efficiency, an agency which was no doubt considered best suited to cope with the then unprecedented conditions which brought to the stockyard live stock in stupendous quantities, to feed a world at war. In those crucial months the basic live stock and packing industry could not well be hampered by tie-ups and confusions at the point of convergence in the great Chicago market of the many railroads bringing in live stock by the thousands of cars daily. The extraordinary conditions required extraordinary facilities to meet them. *A unified and continuous unloading of these tremendous stock receipts, and their intelligent handling and disposal, manifestly conferred upon shippers as well as line-haul carriers an advantageous service more effective and satisfactory than if undertaken by each of the several line-haul carriers for the live stock which it carried.*" (Italics ours.)

also Agent Sperry's I. C. C. Nos. 329 and 339, which are part of Ex. 24.)

[fol. 391] 19. Respondent is not treated as a common carrier by the railroads serving its stockyard. (Respondent's brief, pp. 69-75; Tr. 275-305; Exs. 23 and 24.)

20. Respondent does not have, and is not a participating carrier in, any tariff on file with the commission naming rates or charges for the transportation of persons or property from place to place. The only tariff which respondent has on file with the commission is a tariff stating its charges for performing, as a carrier's agent, the services of loading and unloading live stock at its stockyard in Chicago. (Respondent's brief, pp. 74-75; Exs. 7 and 24.)

21. Respondent has never voluntarily invoked the jurisdiction of the commission. (Respondent's brief, pp. 77-79; Tr. 108-112.)

22. Respondent has no tariffs on file with the Illinois commerce commission, the tribunal charged with the regulation of intrastate rates of common carriers by railroad in Illinois, and has never been required by that body to file tariffs. (Tr. 306.)

23. Respondent's stockyard is "the sole terminal in Chicago for the receipt of the major portion of live stock reaching that point by rail" only in the sense that the railroads afford transportation to and from that stockyard and in the sense that most of the live stock shipped to Chicago by rail moves through that stockyard. (Respondent's brief, pp. 58-62; Tr. 308-315, 352-353.)

24. Respondent has done nothing to render impractical the construction or maintenance of separate live stock terminals by the individual railroads reaching Chicago, and [fol. 392] its former status as a common carrier had nothing to do with its becoming the principal live stock terminal of the railroads in Chicago. Respondent's yard would have become such terminal even if it had never operated a railroad. (Respondent's brief, pp. 59-63; Tr. 308-315.)

25. Live stock ready for market has but one outlet. It is destined to the abattoirs for conversion into meat and meat products. Abattoirs and packing houses cannot be operated where there is a limited supply of live stock avail-

able, but are invariably found concentrated around a central stockyard just as they are concentrated around respondent's stockyard in Chicago. It would not be economically practicable for any large packing house to locate at a stockyard served by one carrier. Respondent's strategic position in Chicago differs in no respect from that of any other public stockyard in the United States. (Respondent's brief, pp. 61-62; Tr. 314.)

Comment

Inasmuch as the question for decision is one of law upon the facts presented, respondent submits that the commission should make a complete finding of the pertient facts shown in the present record, including those which rebut statements and conclusions in the report in I. & S. 4109.

Twelfth Exception

The examiner erred in failing to find that respondent was denied a full hearing, and in failing to recommend that respondent's petition for further hearing before final submission be reconsidered and granted.

[fol. 393] Comment

This petition is referred to by the examiner on sheets 5 and 6 of the proposed report. Since the examiner referred to this petition, respondent takes exception to his failure to find that respondent was not accorded a full hearing and to his failure to recommend that the petition be reconsidered and granted, particularly in view of the recent decision of the Supreme Court in Morgan v. United States, 82 Law Ed. Adv. Ops. 757, decided April 25, 1938, just four days before the proposed report was filed. In this case the Supreme court held that the secretary of agriculture, in an investigation of the rates charged by market agencies at the Kansas City stockyards, had denied the agencies the "full hearing" required by the Packers and stockyards act. In its opinion the court said (pp. 758-761):

"The first question [i. e., whether the secretary's order had been made without the hearing required by law] goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail can not be dealt with directly

by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair [fol. 394] play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

* * * * * * *

"The right to a hearing embraces *not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them.* The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes *and to be heard upon its proposals* before it issues its final command.

* * * * * * *

"Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (Italics ours.)

The commission is referred to respondent's petition for further hearing for discussion of this exception. In that petition it is pointed out, among other things, that respondent, in this investigation initiated by the commission, was denied the right to meet evidence offered by the commission itself.

The examiner's conduct of the hearing was highly arbitrary and unreasonable, and the commission should correct it at this time by granting respondent's petition for further [fols. 395-400] hearing heretofore filed in this case. Respondent again urges each point made in that petition.

Conclusion

The decision of the commission in I. & S. 4109 is not res judicata of the issue in this case. Even upon the present record, which respondent was not permitted to complete, the conclusion must be reached that respondent is not a common carrier subject to the Interstate commerce act. Many of the conclusions reached and inferences drawn by the commission in its report in I. & S. 4109 were shown by evidence in the record in the present case to be unwarranted. The reasoning by which the commission in I. & S. 4109 reached the conclusion that a corporation which does not carry and has no facilities by which it could carry is a common carrier by railroad is unsound and should be reconsidered in the light of the present record. The commission should find that respondent is not a common carrier by railroad subject to the Interstate commerce act, and should enter an order vacating its suspension order and discontinuing this proceeding.

Respectfully submitted, Ralph M. Shaw, R. C. Fulbright, Guy A. Gladson, Bryce L. Hamilton, Attorneys for Respondent.

1400 First National Bank Bldg.,
Chicago, Illinois.

June 6, 1938.

[fols. 401-402] BEFORE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 4296

CANCELLATION OF LIVESTOCK SERVICES AT CHICAGO

Hearing Room A, I. C. C. Building
Washington, D. C.

Thursday, February 11, 1937

The above entitled matter came on for hearing at 10 o'clock, a.m., pursuant to notice.

Before: Commissioner Splawn and Examiner P. O. Carter.

Appearances: Ralph M. Shaw and J. Sidney C. Condit, 1400 First National Bank Building, Chicago, Illinois, appearing for Union Stock Yard and Transit Company of Chicago.

Kenneth F. Burgess and Douglas F. Smith, 11 S. La Salle Street, Chicago, Illinois, appearing for protestants.

[fol. 403] Proceedings

Commissioner Splawn: The hearing will come to order.

Mr. Shaw: Mr. Commissioner, I would like to ask that my partner, Mr. J. Sidney C. Condit of Chicago, be admitted to practice before the Commissioner.

Commissioner Splawn: Has he filed an application?

Mr. Shaw: He will file the application. He is admitted to all the Courts of Illinois and the United States Supreme Court, but he just happens to have not appeared before the Commission heretofore.

Commissioner Splawn: Do you wish to have him assist you here today?

Mr. Shaw: Yes, sir.

Commissioner Splawn: With the understanding that he is qualified, in view of your statement, and in the absence of objection, and with the understanding that he will file his application promptly, he may assist you here today.

Mr. Smith: Rather than objecting, I would like to join in sponsorship of Mr. Condit for that purpose.

Commissioner Splawn: Thank you, Mr. Smith.

At this time and place the Interstate Commerce Commission has set for hearing its I. & S. Docket No. 4296, Cancellation of Livestock Services at Chicago.

Who is appearing for the respondents?

Mr. Shaw: Mr. Ralph M. Shaw and Mr. J. Sidney C. [fol. 404] Condit, for the Union Stock Yard and Transit Company of Chicago.

Commissioner Splawn: Any other appearances for the respondents?

(No response.)

Commissioner Splawn: Who is appearing for the protestants?

Mr. Smith: Mr. Kenneth F. Burgess, who is not present here this morning, and Mr. Douglas F. Smith, appearing for certain railroad protestants.

Commissioner Splawn: Are there any other appearances?

(No response.)

Commissioner Splawn: At this point we will show in the record who is to get the free copy of the transcript.

Mr. Shaw: I have no desire to be grasping, but I would like to have a copy of the transcript.

Commissioner Splawn: One copy will be sent to Mr. Shaw and one copy to Mr. Smith.

Mr. Shaw: I would like to order one extra copy, too.

Commissioner Splawn: The Union Stock Yard and Transit Company of Chicago has filed tariffs cancelling its tariffs now on file, and stating that hereafter it will not file tariffs with the Commission.

Mr. Shaw, are the tariffs under suspension and investigation here the same as, or identical with, the tariffs which were suspended, investigated, and considered in the Commission's I. & S. Docket No. 4109?

[fol. 405] Mr. Shaw: Yes, sir, they are, Mr. Commissioner.

Commissioner Splawn: In view of that fact, I will make as a part of the record the Commission's report in its I. & S. Docket No. 4109, which will be marked for identification as Exhibit No. 1.

(Exhibit No. 1 marked for identification.)

Commissioner Splawn: Respondents will now call their first witness.

Mr. Shaw: Mr. Henkle, will you take the stand?

O. T. Henkle was sworn and testified as follows:

Direct examination.

By Mr. Shaw:

Q. Mr. Henkle, I asked you to prepare a complete history of the Union Stock Yard and Transit Company of Chicago from the date of its organization down to the present time. Have you prepared it?

A. I have.

Q. Are the statements contained in it true to the best of your knowledge and belief?

A. Yes, sir, they are.

Q. Will you please read it to the Commission?

A. I live in Chicago and am Vice President and General Manager of the Union Stock Yard and Transit Company of Chicago. In that capacity I have the direction and operation of the Company in my charge. I have been with the [fol. 406] Company for about thirty years; have been General Manager for seventeen or eighteen years and am en-

tirely familiar with the history of the Company and its activities and operation during the time that it has been in existence.

The property of the Yards Company comprises a half section of land located between 47th Street on the South, 39th Street on the north, Halstead Street on the East and Racine Avenue on the west, and all of it is and has been for many years in the City of Chicago. This property has been occupied by the Yards Company for stock yards purposes ever since the organization of the company.

Prior to 1865 the railroads entering Chicago maintained four points at which they made general delivery of livestock consigned to Chicago and received shipments of livestock consigned from Chicago.

On February 13, 1865, the Yards Company was incorporated by a special Act of the Legislature of the State of Illinois.

Mr. Shaw: Mr. Commissioner, would it suit your pleasure better, when he refers to various things which I propose to have put in as an exhibit, that I offer them in evidence now, or at the end of his testimony.

Commissioner Splawn: It would be advisable to offer the exhibits to which he will refer at this time and have them marked for identification.

[fol. 407] Mr. Shaw: Then I offer in evidence a photostatic copy of the charter of the Union Stock Yard and Transit Company of Chicago, and its by-laws.

Commissioner Splawn: It will be marked Exhibit No. 2.

(Exhibit No. 2, Witness Henkle, marked for identification.)

The Witness: Included among the objects for which the company was incorporated was the construction and the operation thereafter of a general union stock yard for cattle and live stock, including the erection of a hotel and the construction and subsequent operation of a railroad to permit the trains of the railroads entering Chicago to reach the stock yards to be constructed.

A copy of the charter of the Yards Company is offered in Evidence as Respondent's Exhibit 2.

Subsequent to the issuance of this charter, $1,000,000 worth of the stock of the Yards Company was issued, of which $925,000 was subscribed by nine trunk lines reaching Chicago. This stock in the Yards Company was held by

these railroads for some years but was sold by them more than forty years ago and since that time no railroad company has owned any stock of the Yards Company, has had any ownership or stock interest in it or its property or has had any control over any of its affairs.

Upon the issuance of its charter, the Yards Company proceeded to construct a stock yard on the property which I [fol. 408] have described and also to construct a railroad, consisting of about three hundred miles of railroad track, which connected with the various trunk line railroads entering Chicago.

Thereafter, until 1897, the Company continued to carry on its stock yard business and to operate its railroad.

The business of the Yards Company in operating its stock yards was to receive, care for, feed and water all live stock consigned to consignees at its Yards; to furnish facilities and a market for receivers of live stock, commission men and others who did business at the stock yards; to operate a hotel for the benefit of its customers, and generally, to engage in all activities connected therewith; in operating its railroad at that time its business was to carry on such activities as were necessary in connection therewith.

In 1897 the Yards Company leased all of its railroad tracks and all railroad equipment of every kind and description to the Chicago & Indiana State Line Company.

Mr. Shaw: Let me interrupt there for a second. I have here three leases which we propose at the proper time to offer in evidence. The 1897 lease to which the witness refers is attached as an exhibit to the New York Central lease which was made in 1922. At the proper time I will offer a photostatic copy of the New York Central lease, the supplemental New York Central lease, the original lease to [fol. 409] the Chicago & Indiana State Line Company, made in 1897, and the new lease between the Junction Railway and the Stock Yards made in 1913. They are all in this volume.

Commissioner Splawn: Do you wish to have that volume marked for identification as Exhibit No. 3?

Mr. Shaw: Yes, sir. It will contain all of those exhibits.

(Exhibit No. 3, Witness Henkle, marked for identification.)

The Witness: It retained for itself all the other facilities and property, including the loading and unloading facilities,

but all of its railroad property and all property used in connection with the operation of the railroad was, without exception, leased to the State Line Company.

Under the terms of the lease to the State Line Compa y, the Yards Company received as rental two-thirds of he profits derived by the lessee from the operation of the ail-road properties leased to it.

Mr. Smith: Just a moment, please. Mr. Commissioner, I think that I should offer a formal objection to this narrative of the witness concerning the effect of these documents which are identified as exhibits and which are to be put in evidence, and we move to have the testimony that the witness has given with respect to the business of the stock yards company at various times and the contents of these leases stricken from the record as not the best evidence [fol. 410] and constituting a conclusion of the witness.

Mr. Shaw: The leases are in evidence, or will be, themselves. They speak for themselves.

Mr. Smith: That is my point, Mr. Shaw.

Mr. Shaw: All right.

Commissioner Splawn: Your objection is as to the admissibility of this Exhibit No. 3?

Mr. Smith: No, it is not. My objection, Mr. Commissioner, is to the testimony of the witness in which he seeks to paraphrase or give the effect of these documents which are before the Commission, inasmuch as they do speak for themselves and constitute the best evidence of their contents.

Mr. Shaw: To the extent that there is any conflict between them, the lease speaks for itself. He is giving the narrative history of the Corporation.

Mr. Smith: With that understanding I am entirely satisfied.

Commissioner Splawn: The witness may continue.

The Witness: The State Line Company subsequently consolidated with the Chicago, Hammond & Western Railroad, the consolidated company being known as the Chicago Junction Railway Company.

For some time after it came into existence, the Junction Company operated not only the properties theretofore leased by the Yards Company to the State Line Company, [fol. 411] but also a railroad line extending around the City of Chicago.

In 1907 the Junction Company sold its belt line, retaining only the tracks and other railroad property which had been

leased by the Yards Company to the State Line Company.

The Junction Railway Company operated the railroad properties of the Yards Company in the same fashion as any other railroad company was operated. It owned certain equipment, operated its own engines and granted trackage rights to all the trunk lines entering Chicago, thus enabling such trunk lines with their own power to deliver livestock originating on their respective lines to the unloading platform of the Stock Yards Company, where such live stock was unloaded.

Some time prior to 1912 a corporation had been formed in New Jersey, known as the Chicago Junction Railway and Union Stock Yards Company of New Jersey, which I shall refer to as the "New Jersey Company." This corporation was a holding company formed for the purpose, among other things, of owning and holding the stock of the Yards Company and the stock of the Junction Railway, and in 1912 it had acquired all of the stock of both companies.

Under these facts and circumstances the case of United States v. Union Stock Yard and Transit Company of Chicago, reported at 226 U. S. 286, was decided. That case was an action by the United States to enjoin the payment by the [fol. 412] Yards Company of a bonus which it proposed to pay to a packing concern known as Louis Pfaelzer & Sons, and also to require the Yards Company and the Junction Company to file with the Interstate Commerce Commission tariffs, statements and reports, as required by Sections 6 and 20 of the Interstate Commerce Act.

The conclusion of the Court reached in that case was that the Yards——

Mr. Smith: Just a minute. That is objected to as incompetent, irrelevant and immaterial, the testimony of the witness as to what the Supreme Court decided in that proceeding.

Commissioner Splawn: I think, Mr. Smith, we would make progress by permitting the witness to go ahead in his own way. He is referring to the report, and it will take less time for him to quote the report that it will for us at this moment to check up. The report is, of course, available at all times, and speaks for itself.

The Witness: The conclusion of the Court reached in that case was that the Yards and the Junction Company

were both common carriers subject to the Interstate Commerce Act; that they should be required to comply with those sections of the Act applicable to common carriers, and that the proposed payment to the Pfaelzer Company should be prohibited as a rebate. This decision of the Court, [fol. 413] so far as the Yards Company was concerned, was primarily based upon the fact that the Yards Company owned the railroad facilities operated by the Junction Company; that all or a majority of the stock of both companies was owned by the investment company; that there was a substantial unity of operation by all three companies, and that as between the Yards Company and the Junction Company, there was a division of profit arising from the operation of the railroad companies.

Prior to this decision of the Supreme Court the Yards Company had never filed with any regulatory body any tariffs containing a statement of the charges made by it for services performed by it. Its charges had previously been collected from commission men at the Stock Yards representing the owners of live stock shipped to and from the Yards, with the single exception of a charge of 25 cents a car made by it for unloading and 50 cents a car for loading, which it collected from railroad companies, for whom it loaded and unloaded live stock.

Subsequent to the decision of the Supreme Court in the Pfaelzer Case, the Yards Company, for the first time, filed with the Interstate Commerce Commission tariffs containing its charges for loading and unloading live stock for the railroads. This tariff stated that the service was performed for the railroads by the Yards Company as agent of the railroads.

[fol. 414] Also, the Yards Company, in 1913, cancelled the lease under which the Junction Company had theretofore operated the railway properties of the Yards Company and entered into a new lease with the Junction Company under which the Yards Company received as rental for those railway properties, $600,000 a year instead of the two-thirds share in the net profits of operation provided for by the previous lease.

Mr. Smith: I am not clear as to what is in this rather large document.

Mr. Shaw: That 1913 lease is an exhibit, attached to the New York Central lease, and is in that document.

Mr. Smith: Is the tariff to which the witness was just referring as the first tariff filed by the Yards Company with the Commission also in the document as an exhibit?

Mr. Shaw: I did not plan to offer it as an exhibit. I have no objection to you offering it, and I would just as leave have done it, if I had thought of it.

Mr. Smith: I object to the statement as to what that tariff contains, on the ground that it is not the best evidence. In other words, I am seeking to force the respondent to put that tariff in the record, rather than offer testimony as to its contents.

I would like to say, Mr. Commissioner, at this point—I may be wrong about it, but I am clear in my own mind—that the respondents are making a record here which they intend [fol. 415] to take to court, and for that reason I want to be a little more careful on our side of the matter than if that were not so.

Commissioner Splawn: The objection is sustained.

Mr. Shaw: The tariff is on file with the Interstate Commerce Commission, and since counsel makes that very unusual objection, I will ask leave to file a photostatic copy of that original tariff, if I may, to supplement the witness' testimony.

Examiner Carter: Can you file that during the course of the hearing, Mr. Shaw?

Mr. Shaw: If we do not get through too quickly. I can file it within ten days, if that will be all right.

Examiner Carter: You may file it within ten days.

Mr. Shaw: Go ahead.

Mr. Smith: Pardon me. It is not being given an exhibit number now?

Examiner Carter: No number.

The Witness: I herewith tender it in evidence as Respondent's Exhibit No. 3.

This condition obtained until 1919, when the case of Chicago Live Stock Exchange v. Carriers, 52 I. C. C. 209, was decided. That case arose out of an increase by the Yards Company in its loading and unloading charges, which increase the railroads had declined to pay and which was consequently collected from shippers.

[fol. 416] In deciding that case the Commission held that notwithstanding the change in the lease from the Yards Company to the Chicago Junction covering the railway properties owned by the Yards Company, that company

still remained a common carrier and it was, therefore, required by the Commission in that decision, to keep on file with the Interstate Commerce Commission tariffs naming its charges for loading and unloading live stock.

The Yards acquiesced in the conclusion of the Commission made in 1919 that it was then a common carrier and did not then carry the question to the courts. The reparation issue involved in that case was ultimately decided by the Supreme Court in Adams, et al., v. Mills, 286 U. S. 397.

The condition which existed with respect to the Yards Company in 1919 and its alleged carriers status at the time of the Commission's decision, at 52 I. C. C. 209, continued until 1922.

In that year the status of the Yards Company with respect to its alleged carrier activities was not only completely changed, it was revolutionized. The Commission, by its decision in the Chicago Junction Case, 71 I. C. C. 631, authorized the Chicago River & Indiana Railroad Company to acquire by lease, for a term of ninety-nine years and thereafter at the option of the lessee, in perpetuity, all of the railroad properties owned by the Yards Company and the Junction [fol. 417] Company, and operated by the Junction Company, and also authorized the New York Central Railroad Company to acquire control of the Chicago River & Indiana Railroad Company by purchase of all its capital stock.

At that time the Chicago Junction Railway Company owned only one-half of the stock of the Chicago River & Indiana Railroad Company, the other half being owned by Richard Fitzgerald.

Mr. Smith: Mr. Commissioner, may the record show that protestants object to all these conclusions of the witness and to all his efforts to paraphrase and state the effect of legal documents and decisions of the Commission and the Courts? I refer, for example, to such statements as the statement which the witness has just made that "* * * the Yards Company with respect to its alleged carrier activities was not completely changed, it was revolutionized."

This witness, who is the General Manager and Vice President of the Stock Yards, is thus undertaking to characterize the legal effect of certain facts to which he points. I do not want to take the time of the Commissioner to point out in each instance where those things are done which we think are objectionable, of this particular character. If it can be understood that the record will stand as if objection has

been made in each instance and a motion to strike made in each instance, I won't object.

[fol. 418] Mr. Shaw: I have no objection to that. It goes without saying, if he is characterizing anything contrary to the legal effect of the documents which are offered in evidence, why, the documents speak for themselves and control. It is very hard to give a history of a property of this character without possibly reaching some conclusion or inferential statement as to what legal results followed, but the documents speak for themselves. I am now just about to offer these documents.

Mr. Smith: Of course the statement to which I referred does not purport, in its language at least, to rest upon any legal documents. It simply says that the status had changed with reference to common carrier activities. We object to that and move to have it stricken.

Mr. Shaw: I would not quarrel with that. Let it go.

Commissioner Splawn: The objection of counsel is noted on the record and will be considered by the Commission as to any conclusion of the witness to which counsel has objected.

The witness will resume.

The Witness: Inasmuch as the New York Central wished to purchase from the holding company all of the stock of the Chicago River & Indiana Railroad and, in turn, to have the Chicago River & Indiana lease practically in perpetuity the railway properties and facilities then being operated by the Chicago Junction, all of Mr. Fitzgerald's stock was pur-[fol. 419] chased by the Chicago Junction Railway Company, which was then sold to the New York Central.

In a full report in such matter the Commission made a finding of public interest favorable to the New York Central application. It appears in Volume 71 ICC 361. The case was decided May 16, 1922. There were some conditions attached of which the only one seemingly important here was condition No. 1, reading as follows:

"The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shippers the present direct access to the railroad officials."

After the passing of the Commission's order referred to, the stock purchase and lease transaction was executed immediately.

As a result of the Commission's order and upon the conditions stated therein, the lease was made and the yards company, while still retaining some form of title to the railroad properties which it had once owned and operated, was nevertheless completely divested of all control over these properties.

Mr. Shaw: I now offer in evidence the lease which the [fol. 420] gentleman is describing, as Exhibit No. 4.

Examiner Carter: That is the book which you have which contains all the leases, is it not?

Mr. Shaw: This lease is the lease of——

The Witness: May 19, 1922.

Mr. Shaw: May 19, 1922, between the Chicago Junction Railway, the Union Stock Yard and Transit Company, and the Chicago River & Indiana Railroad Company, and the New York Central Railroad Company.

Attached to it is the 1897 lease as an exhibit, being a lease from the Union Stock Yard and Transit Company of Chicago to the Chicago & Indiana State Line Railway Company; and the 1913 lease from the Union Stock Yard and Transit Company of Chicago to the Chicago Junction Railway Company; and still later a supplemental lease executed under the orders of the Commission.

Examiner Carter: That is all in the document marked No. 3, is it not?

Mr. Shaw: Right.

Mr. Smith: Just a minute, off the record.

(Discussion off the record.)

Mr. Shaw: I might say that the 1913 lease from the Union Stock Yard & Transit Company to the Chicago & Indiana State Line Railway Company is on page 138 of this document.

Examiner Carter: Has the witness referred to all the [fol. 421] leases contained within this Exhibit No. 3?

The Witness: We are, at the moment, up to the lease to the New York Central Lines, but they are all within that same book.

Examiner Carter: Are you going to refer to anything else in that book?

The Witness: No, nothing except these leases.

Examiner Carter: You have referred to everything in Exhibit No. 3 which you are going to refer to in your direct testimony. Is that correct?

The Witness: With the exception of the exhibits, the Secretary of Agriculture tariffs which I am coming to later.

Examiner Carter: Are they in that exhibit?

The Witness: They are not in that exhibit.

Examiner Carter: Everything which is in that exhibit you have referred to already in your testimony?

The Witness: Yes, sir.

Examiner Carter: Then, so that as we may keep the record straight, will you make a statement for the record of what documents are contained in Exhibit No. 3.

Mr. Shaw: Exhibit No. 3 contains the original contract for lease of May 12, 1922, between the Chicago Junction Railway Company, the Union Stock Yard and Transit Company of Chicago, the Chicago River & Indiana Railroad Company, and the New York Central Railroad Company.

[fol. 422] Attached to that lease, on page 127—I made a mistake a while ago in saying page 138—attached to that as an exhibit is the photostatic copy of the lease of November 1, 1913, between the Union Stock Yard & Transit Company and the Chicago Junction Railway Company, and that appears on page 127 of the exhibit.

As another exhibit attached to the original lease is the lease of the 15th day of December, 1897, between the Union Stock Yard and Transit Company of Chicago and the Chicago & Indiana State Line Railway Company.

Those are the three leases to which the witness has referred up to the present time, and this last named lease is found on page 138. The rest of it contains descriptions, all of which explain themselves.

Although the witness has not referred to it, I offer in evidence the supplemental indenture, made pursuant to the order of the Commission, dated the 21st day of January, 1929, between the Union Stock Yard & Transit Company and the Chicago River & Indiana Railroad Company and the New York Central Railroad Company, and ask that that be marked Exhibit No. 4.

Examiner Carter: Exhibit No. 4 is a lease made after the decision of the Commission in 71 ICC? Is that correct?

Mr. Shaw: Yes, sir, both of them were made after the decision of the Commission in 71 ICC. One was made in [fol. 423] 1922 and the other was made seven years later.

(Exhibit No. 4, Witness Henkle, marked for identification.)

The Witness: Not only so, but by the terms of the same instrument, the Chicago Junction Railway Company passed out of the picture. While retaining its corporate existence, it divested itself of all the functions of an operating common carrier entitled as such to deal with shippers and other carriers. It ceased to engage in any kind of transportation by railroad and remained a mere shell—a non-operating company.

Commissioner Splawn: Can you amplify that a little? You say it passed out of the picture. It continued to be a corporation, did it?

The Witness: It did, but only for the purpose of receiving the rental from the property which it had leased. It ceased to be an operating company and performs no function, such as it did before.

Commissioner Splawn: Did it continue to be a party to this contract to which you referred?

The Witness: Yes, sir.

Since the lease above referred to, neither the Union Stock Yard and Transit Company of Chicago nor the Chicago Junction Railway Company has carried or transported any passengers or property.

[fol. 424] Mr. Smith: That is a conclusion of the witness concerning the very question which is here in issue to be decided by the Commission, and we object to it on that ground as an improper conclusion of this witness.

Commissioner Splawn: The objection is noted and will be considered. The witness will resume.

The Witness: The transporting activities which had once been conducted by the Stock Yards had for many years been conducted in the name of the Chicago Junction Railway Company. When the Chicago Junction Railway Company ceased to be an operating Company that automatically caused the Union Stock Yard and Transit Company of Chicago likewise to cease being a common carrier by railroad.

Thus, as a result of the changed authorized by the Commission in 1922, a major operation was performed on the Yards Company and the Junction Company. Neither of these companies now has any stock or other interest in any company operating a railroad or engaged in any form of transportation. Neither of them has any control whatsoever over any railroad or of any company which holds itself out as a common carrier by railroad.

The only connection between any one of the three companies and any common carrier by railroad is whatever title the Yards Company and the Junction Company may retain in the railroad properties formerly owned by the Yards Company and the Junction Company and leased to [fol. 425] the Chicago River & Indiana Railroad Company, the stock of which was acquired and the properties of which are operated by a New York Central subsidiary.

The respondent has no interest whatsoever, direct or indirect, in any common carrier by railroad or otherwise. It does not own, operate or in any respect, directly or indirectly, exercise any control over any cars, locomotives or other railroad rolling stock.

It does not transport any freight or passengers by railroad or otherwise, and does not own or operate the facilities necessary in such transportation. It does not hold itself out to so transport freight or passengers, and does not perform or hold itself out to perform any services or acts as a common carrier by railroad or otherwise.

Mr. Smith: Mr. Commissioner, this is not testimony, of course, but is a brief which the witness is reading. It has possibly been prepared by him or by his counsel, and I do not feel that I can sit silent here in the face of these repeated statements that purport to be testimony under oath, that this company is not a common carrier by railroad, when that is the precise question before this Commission. I object to this and all like statements by this witness.

Commissioner Splawn: The objection is noted and will be considered. The witness will resume.

[fol. 426] The Witness: At the present time the Yards Company cannot exercise control of any character over the operation of the railroad properties formerly owned by it or in any way effect the service rendered or the rates charged by the line-haul carriers. Since the lease to the subsidiary of the New York Central Railroad, the railway properties have been operated by the New York Central

subsidiary and it, in turn, accords to other Trunk Line railroads the privilege of running their trains over the trackage to and from the Yards.

The Yards Company since 1922 has only been concerned and connected with the operation of its stock yard properties. In 1921 the Packers and Stockyards Act was passed. Pursuant to the requirements of that Act, the Yards Company was posted as a "public stock yards."

Since the effective date of that Act it has maintained on file with the Secretary of Agriculture tariffs stating its charges for all its yard activities, except its charges for loading and unloading live stock which are now the subject of controversy.

Mr. Smith: At this point I object to that testimony as being incompetent and not the best evidence, and ask that it be stricken, unless the respondent puts in evidence the tariffs referred to.

Mr. Shaw: If you had just waited a minute and a half I would have put them in evidence, because they are right here [fol. 427] for that purpose.

The Witness: I am coming in the next paragraph to that.

Mr. Smith: That is fine.

The Witness: It has, however, until recently permitted, without effort to remove them, its so-called loading and unloading tariffs filed with the Commission before the Packers and Stockyards Act was passed and before the New York Central lease was consummated, to remain on file with the Commission.

A copy of the tariff now on file with the Interstate Commerce Commission is now offered as respondent's Exhibit No. 5, this being the tariff which respondent desires to cancel.

Mr. Shaw: In view of counsel's objection, will you also please put in evidence the tariffs on file with the Secretary of Agriculture?

Examiner Carter: Let us identify the tariff on file with the Commission, Exhibit No. 5. How many tariffs filed with the Secretary of Agriculture are you going to put in? Just one?

The Witness: I have four.

Examiner Carter: Just one tariff?

The Witness: Yes, sir, just one tariff.

Examiner Carter: That will be Exhibit No. 6.

Mr. Smith: That does not satisfy my objection.

Examiner Carter: Exhibit No. 5 contains tariffs of the [fol. 428] Stock Yards Company filed with the Interstate Commerce Commission since 1934. Is that correct?

The Witness: Yes, sir.

Mr. Shaw: These are the tariffs which we are now proposing to cancel.

Examiner Carter: This file includes tariffs filed with the Commission since October, 1934. I do not know whether it includes them all or not.

The Witness: There are six supplements to that tariff.

Mr. Shaw: As I understand it, Mr. Examiner, those tariffs which are in Exhibit No. 5 are the tariffs which are now on file with the Interstate Commerce Commission and which, under the suspended tariff the respondent proposes to cancel.

Examiner Carter: That will be Exhibit No. 5.

(Exhibit No. 5, Witness Henkle, marked for identification.)

Mr. Shaw: Exhibit No. 6 is the present tariff on file with the Secretary of Agriculture.

Mr. Smith: Does that complete your offer, Mr. Shaw?

Mr. Shaw: Yes, sir.

Examiner Carter: Exhibit No. 6 is described as Union Stock Yard & Transit Company Tariff No. 10, issued August 24, 1936, and is the tariff now on file with the Secretary of Agriculture. Is that correct?

The Witness: That is correct.

[fol. 429] Mr. Smith: The Witness, if the Commissioner please, has testified that in 1921 the Packers and Stockyards Act was passed. Pursuant to the requirement of that Act the Yards Company was posted as a public stock yards, and since the effective date of that Act it has maintained on file with the Secretary of Agriculture tariffs stating its charges for all yard activities except those charges for loading and unloading livestock, and so forth.

We ask that the respondent make a part of this record the tariffs which the witness has there referred to. In other words, we want a set of tariffs which they have filed, as the witness has stated, with the Secretary of Agriculture.

Commissioner Splawn: Have you those tariffs?

Mr. Shaw: We have filed the pending tariff, but if he wants a complete history of our tariffs with the Secretary

of Agriculture, I will supply them within ten days. He shall have them.

Examiner Carter: Mr. Henkle, your statement refers to the tariffs which you filed since you became subject to the jurisdiction of the Secretary of Agriculture. Is that not correct?

The Witness: Yes, sir.

Examiner Carter: You want all tariffs filed during that time?

Mr. Smith: Yes, Your Honor.

[fol. 430] Mr. Shaw: All right.

Examiner Carter: Can you file that within ten days?

The Witness: Yes, sir.

Mr. Shaw: Go ahead.

The Witness: Since the Packers and Stockyards Act and the consummation of the New York Central lease the case before the Commission known as the Hygrade Food Products Corporation v. A. T. & S. F. Ry. Co., et al. was heard before the Commission and decided in 195 I. C. C. 533.

This case later went to the Supreme Court under the title of A. T. & S. F. Ry. Co. v. United States, reported in 295 U. S. 193.

In this proceeding, both before the Commission and before the Supreme Court, the Union Stock Yard and Transit Company of Chicago took the position that because of its changed status, it was no longer a common carrier. The Commission did not decide the common carrier status of the respondent in that case and neither did the Supreme Court.

Mr. Smith: Just a moment. If the Commission please, we ask that the respondent be required to put into this record in connection with the statement of this witness as to what the position of the Yards Company was before the Commission and the Supreme Court, the following:

A true copy of the brief filed in that proceeding on behalf of the Yards Company before the Interstate Commerce [fol. 431] Commission; a true copy of the transcript of the oral argument made by all counsel on behalf of the Yards Company in that proceeding before the Commission; a true copy of the answer filed by the Union Stock Yards in the proceeding before the Commission, together with the complaint and the amended complaint filed therein, upon which that proceeding was based; also a true copy of the brief

filed on behalf of the Union Sto-k Yards in the Supreme Court of the United States upon the appeal of the Commission's decision to that Court, or I should say, the litigation before the Supreme Court, to which the witness now refers, in which the effort was made successfully to set aside the decision of the Commission.

Mr. Shaw: I see no reason why I should be required to put that into the record. I have no objection to it going into the record. If counsel wants to offer it when he gets to the side of the protestants, it will go in without objection on my part.

Mr. Smith: Mr. Commissioner, I think counsel overlooks the fact——

Mr. Shaw: I leave it to the Commission. It is a matter of indifference to me.

Mr. Smith: — that the witness has stated that the Union Stock Yard and Transit Company of Chicago in that proceeding took the position that because of its changed status, etc., that was the situation. I want the best evidence as [fol. 432] to what the position of the Yards Company was in that proceeding, and I submit that the best evidence is presented in the documents to which he referred.

Commissioner Splawn: There is no objection by counsel for the respondents, as I understand it, and this transcript, these briefs, and other documents to which counsel for protestants referred are available, and I will ask counsel for the respondents to supply them within ten days.

Mr. Shaw: We would be very glad to do it.

The Witness: Because of its failure in the Hygrade litigation to obtain a decision with respect to its common carrier status, the Yards Company, on May 20, 1935, filed with the Commission its tariffs proposing to cancel those tariffs then on file with the Commission containing its loading and unloading charges. These cancelling tariffs were suspended by the Commission in I. & S. Docket 4109, reported at 213 I. C. C. 330. In this decision the Commission by a divided decision, held against the contention of the Yards Company.

Thereupon the Yards Company filed its bill of complaint in the United States District Court for the Eastern Division of the Northern District of Illinois to set aside the order of the Commission requiring it to withdraw its cancellation tariffs. This case is known on the dockets of the

District Court as Union Stock Yard and Transit Company [fol. 433] of Chicago v. United States, in Equity No. 15024.

Mr. Smith: At this point we ask the respondents to make a part of this record the bill of complaint to which it refers.

Commissioner Splawn: The witness having referred to that bill of complaint, counsel for respondents will supply it within ten days.

Mr. Shaw: All right.

The Witness: Simultaneously with the filing of the bill of complaint the company filed a petition for a rehearing before the Commission, in which the company sought, among other things, the privilege of introducing additional evidence and insisted that it had been denied the fair hearing provided by law in that it had been given no opportunity to argue the case orally before all the members of the Commission who rendered the decision.

Mr. Smith: We ask that that petition for rehearing and reconsideration in Docket No. 4109 be made a part of this record as the best evidence of its contents.

Commissioner Splawn: Will counsel furnish that?

Mr. Shaw: We will furnish it within ten days.

The Witness: Before the hearing on the petition in the District Court, the petition for rehearing was denied and the Company elected not to proceed in court on the record that had been made.

[fol. 434] On the other hand, the company was of the opinion that if it was a common carrier, as a majority of the Commission has decided, it followed, as a matter of course, that it had a right to enter into joint rates with other carriers. It did enter into a joint rate with the Chicago Great Western Railway Company.

At the same time it invited every other railroad company entering the City of Chicago to enter into a like joint rate. All the railroad carriers, except the Great Western, refused.

Thereupon, the tariff containing the joint rate with the Great Western having been published, the Commission promptly suspended it and this proceeding is known on the dockets of the Commission as I. & S. Docket 4244.

The record in that proceeding discloses that at the inception of the hearing the Stock Yards Company took the position that it did not believe that it was a common carrier; that it thought that the Commission had erred in its decision in I. & S. Docket 4109, and that the reason which induced

it to join in the publication of the joint rate was the fact that if it was a common carrier it had a right to enter into the joint rate as a matter of course.

Mr. Smith: Just a moment. That is not the fact, and in order to show by the best evidence what the position of the Yards Company was in that proceeding, in the first document which it filed with the Commission, we ask that there [fol. 435] be made a part of this record the reply which the Yards Company filed in that proceeding to the protest against the tariff.

Mr. Shaw: The witness' statement refers to the record which was made on the hearing before Examiner Taylor in Chicago. I am perfectly willing to put into the record my opening statement which was made before Examiner Taylor. I can get it from him right now, because he is in the room, if he has got a copy of it, but I will put it in the record, if counsel wants it.

Commissioner Splawn: Within ten days?

Mr. Smith: Just a moment. If counsel wants to put it in——

Mr. Shaw: I do not want to put it in. You want it. I do not care about it one way or the other.

Commissioner Splawn: One at a time, please.

Mr. Smith: If Mr. Shaw wants to offer the opening statement which he made at that hearing, I may have to say something about that offer. What I am asking counsel to produce and make a part of this record is the document which they filed in reply to the protest of the carriers in that proceeding, thus showing by the best evidence the position that they took with respect as to whether or not they were a common carrier in the first action which they took in that proceeding.

Mr. Shaw: I have made no reference to that, and the [fol. 436] witness has made no reference to it. If counsel wants to argue it, he may, and he can put it in evidence without my objection, but where this position was taken on the record was at the hearing before the Examiner in Chicago. I am perfectly willing to put it in if he wants it to go in, and if he does not want it to go in, to leave it out.

Commissioner Splawn: While the witness did not refer to a particular document, I understood him to comment on the position of the respondents.

Mr. Shaw: He said at the inception of the hearing. That is what he said. The hearing took place before the Examiner, and he is entitled to have it, if he wants it.

Mr. Smith: Technically Mr. Shaw is correct about that, but we urge the Commission that, as a matter of good faith, in stating the position of the Yards Company, that the reply which they filed to this protest which records the first statement of their position before the Commission in that proceeding be made a part of this record by the respondent.

Commissioner Splawn: This would be a good place in the record in connection with your testimony to put it in.

Mr. Shaw: I have no objection to it going in. If they want it as an exhibit, they can have it.

Commissioner Splawn: We understand, but you will furnish it within ten days. As I understand it, Mr. Shaw, you will also give us a copy of the statement to which you [fol. 437] referred, which you made?

Mr. Shaw: Yes, I will be glad to do that.

Mr. Smith: I want to record an objection to that, as a matter of personal privilege, if I may term it that. Mr. Shaw in his opening statement made some personal references to counsel, which I had supposed, starting out afresh in this new proceeding, he would be glad to withhold, inasmuch as they certainly have no place here—I thought they had no place there—and we object to that being made a part of this record.

Examiner Carter: Gentlemen, we cannot in this proceeding consider what position you took simply by having the witness paraphrase what your position might have been.

Mr. Shaw: I will furnish it.

Examiner Carter: If you want to establish what your position was at the original hearing, you should do so by competent evidence.

Mr. Shaw: All right, I will furnish it.

Mr. Smith: As I recall it now—and Mr. Shaw can correct me if I am wrong—but my recollection is that that opening statement which Mr. Shaw made contained certain personal references to counsel, but did not touch even remotely upon his position as to the legal question in this case, and in that case to which the witness is here referring. Is not that correct, Mr. Shaw?

[fol. 438] Mr. Shaw: I am not going to get into any altercation. If you want to take this off the record for a second, I will explain it to the Commissioner and the Examiner.

(Discussion off the record.)

Examiner Carter: My point was this: What the witness wanted to establish is your position.

Mr. Shaw: That is right.

Examiner Carter: In the former proceeding.

Mr. Shaw: That is right.

Examiner Carter: If you want to establish that, let us have some part of that record in which you did take that position, not necessarily your opening statement. I do not know whether that contains your position or not.

Mr. Shaw: We will furnish it, Mr. Carter.

Examiner Carter: The point is this: We cannot consider what this witness may consider was the position which you took in the former hearing. That is the only objection I had to it.

Mr. Shaw: Of course the fact is as stated. I agree, but as is so frequently done before the Commission, while it is not the best evidence and would not be in a court of justice, those things are generally accepted in the hearings before the Commission, but I will bring the best evidence in, if the point is made, and it will be in here within ten days.

Mr. Smith: Thank you.

[fol. 439] Commissioner Splawn: The point has been made, and it is understood it will be brought in within ten days.

Mr. Shaw: Yes, sir.

Commissioner Splawn: The witness will resume.

The Witness: This case has been heard and has been submitted to the Commission on brief and argument and is now awaiting decision. The joint rate having been suspended, the Yards Company again filed tariffs undertaking to cancel those tariffs on file with the Interstate Commerce Commission and containing its loading and unloading charges, these being the tariffs now under suspension in this case, known on the dockets of the Commission as I. & S. Docket No. 4296.

Mr. Shaw: That is Exhibit No. 5?

The Witness: Yes, sir.

I now proceed to an elaboration of the activities of the Stock Yards Company and of the difficulties in which it at present finds itself.

As I have said, the Yards Company, as a carrier's agent, unloads at the Union Stock Yards cattle consigned over the various trunk lines to consignees at the Stock Yards.

Its only activity consists in furnishing a loading, unloading and stock yard service in connection with the shipping,

receipt and delivery of live stock for the railroads which haul such stock to and from the Stock Yards.

[fol. 440] From 1867 until the decision in 226 U. S. 286, this charge was 50 cents a car for loading and 25 cents a car for unloading, and was not published in any tariff filed by the Yards Company with anybody. It was paid to the Yards Company by the railroads. In 1917 these charges were increased by 25 cents, which led to the Loading and Unloading Charge Cases before the Commission, reported at 52 I. C. C. 209 and 58 I. C. C. 164.

Afterwards they were increased to $1 a car for loading and unloading, under authority granted at 61 I. C. C. 223. As indicated in Exhibit No. 4, they are now $1.25 per single deck car and $1.50 per double deck car for loading and unloading.

Mr. Smith: We ask that pamphlet copies of the decision which have been referred to be made a part of this record, namely, 52 I. C. C. 209; 58 I. C. C. 164; and 61 I. C. C. 223.

Mr. Shaw. They can be considered as a part of the record. That is the reason they are referred to. The volumes speak for themselves. They can be considered as a part of the record.

Commissioner Splawn: It is stipulated that they are a part of the record?

Mr. Shaw: We will stipulate that they are a part of the record. That was the intention.

Mr. Smith: All right.

The Witness: Except for the period from May 1917 to March 1, 1920, when the question as to whose duty it was as [fol. 441] between the shipper and the railroad to load and unload live stock was being litigated, and even then partially, the loading and unloading charges of the Yards Company have always been paid to the Yards Company by the line-haul railroads hauling live stock to and from the yards.

In 1935 the Stock Yards Company unloaded for 23 railroads 89,941 cars, containing 6,376,343 animals, and loaded out 23,387 cars. Practically all of these cars were brought to the Stock Yards Company chutes in train lots, some trains having as many as seventy cars. These cars are brought to the unloading platforms of the Stock Yards Company by the engines and crews of the line-haul carriers and the crews remain until the live stock is unloaded and then take the empty cars immediately back to their lines.

It is imperative that empties be immediately removed in order to prevent congestion which would greatly delay the entire movement. The stock yards company has facilities for setting 350 cars at one time with two chutes to each car length.

The first train arriving is unloaded into the odd numbered chutes and as soon as the empty train is removed another train can be set at the same platform and unloaded into the even numbered chutes. While this latter process is going on the Stock Yards employees are removing from the odd numbered chutes the animals from the preceding [fol. 442] train, which makes the process practically continuous.

The Stock Yards' employees on the platforms, or unloading chutes, make records of the cars from which animals are driven. While this is being done the conductor takes the waybills to the receiving office, where clerks prepare bulletins, which are publicly posted, to notify the consignees, who in most cases are the commission firms or other selling organizations.

At the same time the original records are started and passed along to the yardmasters, who continue the records, showing the disposition of the animals. Record must be kept of the dead or crippled animals, both the railroad and the shipper looking to the Stock Yards Company as their neutral representative to protect their interests.

Other records must be made from which the freight may be collected, one of the services performed by the Stock Yards Company for the railroads being collection and guarantee of the railroad freight or other charges of the railroad company. If the consignees are not on hand to receive the animals on arrival, the Stock Yards Company removes them from the unloading chutes to other pens, where they are locked up and held until called for by the consignee.

As I have said, consignees may take delivery of animals at the chute pens if they so desire, but if this is done it must be done almost simultaneously with the unloading of ani- [fol. 443] mals into the chute pens.

This immediate removal of animals from the chute pens to other pens is absolutely necessary in order to preserve an even flow of live stock from the cars into the Yards. During the run, that is to say, while the trains are coming in, it is not possible for animals to be stored in the chute

pens for any time whatever. We remove them as quickly as possible.

One feature of the operation of a stock yards which adds greatly to the general expense is the fact that live stock does not arrive at the yards in an even stream. The largest supply reaches the yards on Sunday nights and Monday mornings, the number of cars during this period having reached as high at 3,228 cars.

We have also received in one day 122,749 hogs; on another day 71,792 sheep; and on still another day 49,128 cattle. The Stock Yards Company must be prepared to handle the live stock as it arrives, in whatever quantity, efficiently and with dispatch. It must keep a suitable force on duty at all hours all over the property. Police must be provided to protect the property and keep order.

It is greatly to the advantage of all concerned—the producers, the railroads, the selling agencies, the packers and the consumers—to have all of these activities centered in one place, such as the Union Stock Yards, so that the Stock [fol. 444] Yards Company, by functioning for all of these interests, may balance up the work to the best advantage.

In the report of the Commission in the Chicago Junction Case, 71 I. C. C. 631, it was said that all parties agreed that this was the only practical method of handling the live stock traffic and this is correct.

Mr. Smith: May we stipulate, Mr. Shaw, that that decision of the Commission shall be considered a part of this record for all purposes, and with the same effect as if it had been physically offered here?

Mr. Shaw: I do not know what you may mean by that. It may be considered a part of the record for whatever part it plays in it. You say "for all purposes." It may be considered as a part of the record in this case. That is the purpose for which it is referred to.

Mr. Smith: Thank you.

Commissioner Splawn: As I understand it, it is agreed that this report of the Commission is made a part of the record?

Mr. Shaw: Certainly.

The Witness: In addition to the activities I have already recited, the Stock Yards also and of course furnishes stock yards service for shippers and consignees of live stock and for railroads when outbound livestock is delivered to the

Yards Company, and the latter has no car placed to re-
[fol. 445] ceive it.

As part of its stock yards business the Yards Company further frequently feeds and waters livestock in transit, for which it is similarly paid a fixed compensation by the carrier handling the stock to and from its yards.

As heretofore stated, the Yards Company is a stock yards under the Packers and Stockyards Act of 1921 and is posted by the Secretary of Agriculture as such. As such a stock yards, it performs the service of furnishing facilities at the yards in connection with the receiving, buying, selling, marketing, feeding, watering, hauling, delivery, shipment, weighing or handling of live stock in interstate commerce. Its charges for these services are filed by it with the Secretary of Agriculture as required by the Packers and Stockyards Act.

We have already filed a copy of this tariff as Exhibit No. 4, and we are going to file the others which have not been filed.

Immediately after the effective date of the Packers and Stockyards Act, the Secretary of Agriculture began and has continued to exercise jurisdiction over the Yards Company. Ten or twelve years ago the Secretary of Agriculture made an elaborate investigation of the yards. It was enormously expensive both as to time and money.

Voluminous hearings were held over a period of years. [fol. 446] The case was finally abandoned and another one, to which I will refer later, was instituted. All of these charges for Stock Yards services, contained in our tariffs filed with the Secretary of Agriculture, are involved in those proceedings before the Secretary of Agriculture, and all of the services performed by the Yards Company are being investigated therein, including, indirectly, the unloading service and the loading service for the railroads, as I have described them. In this connection it must be remembered that many of the services which I have narrated above as being performed by the Stock Yards for the railroads have nothing to do with the manual work of loading and unloading the live stock.

Mr. Smith: Mr. Henkle, what do you mean by your statement that, "including, indirectly, the unloading service and the loading service for the railroads?" Will you amplify that, please, and state what you mean?

Mr. Shaw: Cannot you do that on cross examination? If I were examining him by question and answer, that would come up on cross examination.

Commissioner Splawn: It is not the purpose here, as I understand these inquiries, to cross examine the witness, but merely to clarify it as he proceeds.

Mr. Shaw: I will adapt myself to the wishes and convenience of the Commissioner, but it really is cross examination. [fol. 447] Commissioner Splawn: All cross examination should be deferred.

Mr. Shaw: I should much prefer, if he wants to elaborate that, to have it come up on cross examination.

Mr. Smith: I won't press the matter, if Mr. Shaw has that feeling about it.

Commissioner Splawn: Very well, the witness may continue with his statement.

The Witness: None of the charges filed with the Secretary may be raised or lowered except with his permission or approval. Generally speaking, these services consist of caring for animals; feeding and watering them; driving them when necessary, furnishing weights and scales, and performing a variety of other services incidental to the proper care of such animals. It includes, in fact, all of the services performed by the Yards Company as a stock yards.

A service additional to the unloading service is performed by the Yards Company, even on live stock of which possession is taken by consignee immediately upon unloading and while the stock is in the chute pens. Such animals must be driven across property of the Yards Company, there being no other way of getting the animals from the chute pens to a location outside of the yards.

After delivery of the live stock to the Commission Men or other selling organizations, the animals are, by these [fol. 448] selling agencies, prepared for sale in such manner as it is deemed will bring the most satisfactory results. When the animals are sold they are brought to the scales, where they are weighed by the employees of the Stock Yards Company in the presence of the buyer and seller, and a weight ticket in quadruplicate is made with what is known as a self-registering beam, in order that every possibility of error may be eliminated. One copy of the ticket is provided for the buyer, one for the seller, and two retained for record. Fifty scales must be manned, properly maintained and frequently inspected.

While this large force must be ready to weigh promptly any animals brought to the scales, there are many days when the average work done at each scale is very light; still they must always be ready, and this is a serious expense in connection with the weighing.

As soon as the animals are weighed, employees of the Stock Yards Company drive them from the scales to suitable holding pens, where they are held awaiting the disposition of the purchaser and when the purchaser arrives, delivery is made to him by a Stock Yards employee.

If animals are purchased at the Yards for out shipment, the consignor delivers them to the Yards Company, as agent for the outbound carrier. In most instances the outbound carrier does not then have any car into which the cattle may [fol. 449] be loaded and is unable to say at what time or at what chute a car will be placed for loading.

The Stock Yards Company, as agent, must store the animals until the railroad company is able to tell it at what time and at what chute the railroad company's outbound car will be placed.

When the car is placed at a chute, the employees of the Stock Yards Company drive the animals to the appropriate loading chute and load them for the railroad company into cars designed by the railroad.

To perform all this service requires an organization and facilities which are very complete.

Commissioner Splawn: Who designates the chute at which the car will be spotted?

The Witness: The railroad provides a list showing the order in which the cars will be spotted and the numbers of the cars, and it is then figured out as to what particular chute will contain the animals that are to be loaded in the particular cars.

Commissioner Splawn: Who determines or figures that, as you say?

The Witness: The railroad company furnishes the loading list which will show us at which chute the cars will be set. We have nothing to do with that.

Commissioner Splawn: You mean that the line haul [fol. 450] determines at what chute the railroads will deliver its car, and notifies the Union Stock Yards & Transit Company that it is spotting car such-and-such a number at such-and-such a chute?

The Witness: No, I mean, it is not exactly like that, but that loading list shows the order in which the cars will be set in and then as the cars are set in you check up on the chute which is in front of each car number.

Commissioner Splawn: Who determines at which particular chute a car shall be delivered or spotted?

The Witness: That is a railroad functon. They do that.

Commissioner Splawn: And they notify the Union Stock Yard & Transit Company?

The Witness: Yes, sir, they give us a loading list.

Commissioner Splawn: That is what you meant awhile ago when you said that it was figured as to where the car would be placed, at what chute? The figuring was done by the railroad company?

The Witness: Yes, sir.

Commissioner Splawn: That is the line haul carrier?

The Witness: And I believe one of the conditions under which they make up the list is having in mind the train order in which they wish to have the cars, having in mind the stations to which they are to go.

Commissioner Splawn: How do they get that information about these stations?

[fol. 451] The Witness: They get that from the joint agency of all the railroads, which furnishes that information.

Commissioner Splawn: Where do they get it?

The Witness: The joint agency gets it from the various railroads or complies the list itself for the railroads.

Examiner Carter: How do the railroads know that there are going to be outbound shipments of livestock?

The Witness: They find that out when the cars are ordered from the district agents.

Examiner Carter: In other words, a shipper or owner of livestock will say that he wants to make a shipment, and he will notify the joint agency in the stock yards?

The Witness: Yes, sir.

Examiner Carter: And then the joint agency notifies the railroad lines as to the destination of the livestock and what cars are needed? Is that it?

The Witness: That is correct.

Commissioner Splawn: How does the railroad know to what chute to take the empty car?

The Witness: By custom the various railroads have a platform assigned to them to which they daily set cars, and

the Stock Yards Company knows that that is the customary chute or platform at which the various roads will set their cars.

Examiner Carter: When you hold stock in certain pens before you determine where the cars are to be set, you [fol. 452] hold them for account of the owner of the stock, do you not?

The Witness: The first information that we receive as to the road over which the livestock will be shipped is from the owner of the livestock who, in most cases, has just had the livestock weighed to him. He delivers to us an order naming the pen in which the livestock is kept, to deliver to whatever railroad he desires to ship over.

This order then is passed along to our men so that the livestock may be collected at the point where that particular railroad is to load out.

We have ten different platforms, but the various roads are assigned for loading out various platforms or portions of platforms which they use every day.

Mr. Shaw: If I might say something, Mr. Examiner, in response to your inquiry to the witness, I don't think it is possible to answer the question, as a matter of fact. As far as I know, it has never been decided, because in cases where losses have resulted, and covered by insurance, the question has never been decided, but I have gone into the operation very carefully. The stock is delivered by the consignor, who is a commission man or a buyer, and he says, "I am sending this east over the New York Central," as an illustration, and that may come early in the morning. The New York Central does not know whether they will have a car at the loading chutes until late in the afternoon, and in [fol. 453] the meantime, that cattle is being held and delivered to the Stock Yards Company until a car is brought by the line which is going to place it. Where that responsibility is, it is one of the moot questions which might sometimes arise. I would not like to answer it myself right off the reel.

Commissioner Splawn: The witness made a declaration as to this operation which I did not quite understand. As I understand it now, Mr. Henkle, a shipper with livestock at the yards of the Union Stock Yard & Transit Company wants to ship out over a particular railroad, and you say that that shipper notifies the Stock Yards Company of that fact, or the joint agency. Which does he notify?

The Witness: He goes to the joint agency and orders a car, and then he files an order for the delivery of the livestock.

Commissioner Splawn: Files an order with whom?

The Witness: With us. I might say, Mr. Commissioner, that many of these things are described in the statement a little further along.

Commissioner Splawn: Very well.

The Witness: I am just coming to many of these points.

Commissioner Splawn: All right, go ahead.

Mr. Smith: Are you going to elucidate later in your statement any further that particular detail as to who determines what chutes animals will be loaded at or unloaded at? Are you going to cover that any further in your statements?

[fol. 454] The Witness: That is covered in a general way, and I think we might, from that point, possibly, develop any details which are necessary.

Mr. Smith: I see.

The Witness: The Stock Yards Company, as agent, must store the animals until the railroad company is able to tell it at what time and at what chute the railroad company's outbound car will be placed.

When the car is placed at a chute, the employes of the Stock Yards Company drive the animals to the appropriate loading chute and load them for the railroad company into cars designated by the railroad.

Mr. Smith: We object to the statement that they store these animals as the agent, as being a conclusion of the witness and not a statement of fact.

[fol. 455] Commissioner Splawn: What he means is that the Stock Yards Company takes charge of the animals until they are put in the cars, and the question of whether they are kept for the account of the railroad or the account of the shipper, you are not attempting to say that, are you?

The Witness: No, sir.

Mr. Shaw: It becomes now appropriate for me to say what I started to say a moment ago.

My personal opinion, for whatever it may be worth, is that the Stock Yards Company furnishes stock yard facilities for the railroad company, for the purpose of holding the animals until the railroad company is able to furnish a car and tell when it is going to be placed there. That is my personal opinion about the matter.

The Witness: To perform all this service requires an organization and facilities which are very complete. The organization must be prepared to function at all hours of the day or night and must always be maintained at a point which will enable it to take care of the maximum amount of business.

Handling stock in this fashion, both as to loading and unloading service and the yards service, is the only thing that renders the receipt, sale and delivery in the Chicago market of the animals that are handled there daily. The Chicago market is now and for many years has been the [fol. 456] largest and most important live stock market in the world. It has reached this development only because live stock deliveries are concentrated and are handled in the manner which I have outlined.

This method of handling has also enabled substantial economies to be put into operation in other directions.

An important function of the Stock Yards Company is in connection with the furnishing of weights on which the railroads base their freight charges and on which the consignees and selling agencies make accounts of sales and returns to the consignors.

For almost half a century after the opening of the Yards these weights were secured by weighing the loaded cars and thereafter returning the empties to the railroad track scales. The weights were then telephoned or telegraphed back to the various railroad offices.

About eighteen years ago the railroads formed a Joint Agency and arrangements were made by which the actual hoof weights are furnished by the sales agencies and on this weight the freight is based, the method being as follows:

The live stock train conductors deliver their waybills to the Stock Yards Company; from these bills, as heretofore stated, the bulletins are made up and posted, advising the consignees of arrivals.

[fol. 457] The waybills are then taken from the Stock Yards Company's Receiving Office to the office of the Joint Agency, where the waybill and the stub are numbered so that they may be readily matched up when they are later returned to the Joint Agency.

The Joint Agency rate clerks check the rates and the minimum weights; and the number of animals, in accordance with the count furnished by the Stock Yards Company, is placed on the stub and waybill. The stubs are then sepa-

rated from the waybills and distributed to the various commission firms and sales agencies, who insert the actual hoof weights as ascertained from the Stock Yards Company's scales. The stubs are then returned to the Joint Agency and matched up with the original waybills.

Here the extensions are checked and the waybills are refigured where the actual weights are in excess of the minimum and the stub is once more checked with the waybill to see that they agree. The waybills are then kept in the Joint Agency and the necessary records made from them, a statement being prepared showing the amount due all the railroads, and this statement and the stubs are sent to the Stock Yards Company for collection.

For a long time the railroads did not get their weights in this fashion, but got them themselves before the stock came over to the yards, and then when the car was made empty, [fol. 458] they took the car back and weighed it light, then deducted the one weight from the other, and in that fashion got the weight of the animals.

The present method of ascertaining the weights was put in, I assume, as an economy measure, and as a more efficient way of doing what the railroads were able to do on their own scales.

As to whether at the present time the old antiquated methods of getting the weights could be restored if it became necessary, I imagine this could be done only over the dead bodies of the terminal superintendents. I have an idea that the consignees and the people who depend upon the Stock Yard weights, and the people who pay the freight charges might also have some objection to it.

The present method of securing the weights has been satisfactory to everybody. The present method is actual hoof weights, taken by an independent party, to-wit, the Stock Yards Company.

Mr. Smith: We ask, if counsel would be good enough to indicate at this point, the purpose of this testimony and the point of it?

Mr. Shaw: The purpose of this testimony is to give the Commission, possibly in a little clearer, coherent and a narrative form the complete story of the activities of the [fol. 459] Yard, so that it cannot be said by anyone at any time that any single solitary thing was omitted that we could think of, because I want to get in the record the complete picture.

I question very seriously whether these details throw any light upon the legal question with which the Commission is confronted. There is only a page or two more and it does not hurt, and I would say, let us go through with it. If you want to strike out any particular sentence or sentences, I do not object.

Mr. Smith: Is it a part of the transportation service furnished by the Yards Company?

Mr. Shaw: No, I do not think it is transportation service. It is service furnished to railroads for further transportation.

Commissioner Splawn: Proceed.

The Witness: The consignees habitually receiving stock at the Yards furnish a bond to the Stock Yards Company guaranteeing the payment of the freight bills of the railroad company to the Stock Yards Company. This enables the Stock Yards Company to pass all stock immediately along into trade channels.

The volume of these freight transactions is indicated by the high spot in 1918 when the Stock Yards Company gave to the railroad administration a check for $985,323.27 for stock freights for one week.

[fol. 460] In my opinion that is also a substantial advantage to the consignees who are obligated to pay the freight charges, for the reason, of course, that they do not have to deal with individual railroads. This method of handling the freight charges permits them to deal with one party, being a party located conveniently to their places of business.

The Western Weighing Association, representing the railroads, has its representatives at the receiving platforms throughout the Yards checking and reporting on the condition of animals on arrival, weights and other details, as instructed by the railroads.

The Stock Yards Company's fifty scales are inspected regularly by its own experts in accordance with the rules laid down by the Secretary of Agriculture and the scales are independently inspected by the City at regular intervals.

The U. S. Government inspects all the arrivals so that any diseased animals in the receipts may be segregated and given further inspection when necessary.

As a result of the methods of handling livestock which have obtained in Chicago for the last fifty years, an essential speed in handling the traffic has been developed. This speed is necessary if congestion and delays are to be avoided.

It permits the handling of live stock in trainload lots, [fol. 461] which could not possibly be done if deliveries were scattered. It permits the making of necessary records without delay or damage to the st ck itself and has proven eminently satisfactory to everyb dy and must be conceded to be the only practical method of taking care of the volume of live stock traffic which moves to and from Chicago every day.

The system of handling has been developed over a long period of years and improvements have been constantly made as experience dictated their desirability or necessity.

As I have said, during the peak hours when the cattle come in in large numbers and are unloaded out of the cars into unloading chutes and pens, the latter are at times quite inadequate to accommodate all the cattle arriving at such peak hours and the result is that other pens in the Yards, ordinarily used for other stock yard purposes, must be available and frequently are used for storage or holding pens.

The Stock Yards now finds itself in an embarrassing, untenable, intolerable position. The Secretary of Agriculture is at this moment engaged in valuing the respondent's property in Chicago devoted to its stock yards activities and investigating its entire rate structure.

The hearing has been going on daily, with one short ad- [fol. 462] journment because of illness, since the 8th day of August, 1936. It will probably continue for several weeks more.

If the respondent is held to be subject to the jurisdiction of both the Interstate Commerce Commission and the Secretary of Agriculture, no one can tell at the present time just what part of the property is devoted wholly to stock yards activities and just what part of the property is devoted wholly otherwise, because, as I stated above, at peak hours some of the pens which are clearly devoted during a major portion of the time to ordinary stock yards activities are for some portions of the time utilized for holding or storage pens for carriers.

If the respondent is a common carrier, it is impossible for me, as the Manager of the Yards, to tell where it ceases to function as a carrier and begins to function as a stock yards.

The respondent has now on file with the Secretary of Agriculture tariffs establishing certain charges against rail-

roads to compensate the Yards Company for all those services which it performs for the carriers other than and in addition to the service of loading and unloading. These tariffs have not been suspended and are in full force and effect.

Nevertheless, the railroads have declined to pay the [fol. 463] charges established thereby and suits are now pending against some of the carriers predicated upon such tariffs to collect those charges.

The business of the respondent at the Stock Yards has been a gradual evolution. The Company has endeavored to conform to the necessities of its customers from time to time as they arose.

As an illustration, there are many more pens in the Yards than there were in 1905. When the revenue from all of the activities of the Yards, was sufficient, in the aggregate, to furnish an adequate return upon the value of the property devoted to the entire business, the respondent did not attempt to nicely allocate just what part of its revenue was to be credited to some activities and what part to other activities.

But as the situation has developed under the dual regulation of two regulatory bodies, the respondent finds itself in the position of being required to prove to the satisfaction of one regulatory body just what property is devoted to the activities under the jurisdiction of that regulatory body and the value thereof and the right to earn a reasonable return.

It likewise finds itself in the position of being required to prove to the satisfaction of the other regulatory body just what property is devoted to the activities under the jurisdiction of that and the value thereof and the right to [fol. 464] earn a reasonable return thereon.

In other words, it finds itself between the upper and the nether millstone. I mention these various things to show how the status has changed since 1921.

The respondent is one of 136 public stock yards throughout the United States and is so designated by the Secretary of Agriculture.

Mr. Smith: One moment please. We object to that testimony by this witness, or by any witness on behalf of the stock yards company, concerning the situation at any other stock yards in the country.

Commissioner Splawn: I had not understood that the witness had undertaken to do that.

Mr. Smith: He is just about to say that, your Honor, and having the benefit of the transcript of his statement, which has been furnished me, this is one case where I can make a timely objection. I want to amplify that in a word or two, if I may.

I do not find the brief which I am looking for, but in the petition or application for reconsideration, which was filed in Docket No. 4109, the respondent set out at some length its desire to have that case reopened in order that it might prove what the situation was at other stock yards throughout the country.

The Commission with that before it in that application, [fol. 465] denied the petition for rehearing, and specifically ruled, as we contend, upon the procedure and admissibility of this evidence.

If the Yards Company had declined to cancel its tariffs pursuant to the order of the Commission in Docket No. 4109, or if it had, within a day or two, filed the cancellation notice which is now before the Commission, I do not think that there would be any question but what they were clearly in contempt of the Commission's order. They have had the grace to wait for a year before they have attempted in this round about way to get the rehearing which the Commission formerly denied them.

The essence of the situation is the same. Not only has the Commission specifically ruled as I contend upon the admissibility of the evidence, but they are sustained in that ruling by the decision of the Supreme Court, written by Mr. Justice Brandeis, I think, in Adams versus Mills, which is referred to in our reply to the petition to reopen docket No. 4109, in which the Supreme Court states that the question is not a question of law alone, as to whether the stock yards company is a common carrier at that particular point, but it is also a question of fact, and is to be determined by the facts pertaining to the situation at Chicago.

Commissioner Splawn: We will take a recess of five minutes.

[fol. 466] (Thereupon a short recess was taken.)

Examiner Carter: Do you desire to say anything, Mr. Shaw?

Mr. Shaw: I expect to prove, not by this witness, but by another witness, probably the best qualified man in the

United States, the facts with respect to every one of the 136 publicly posted stock yards in the United States, no one of which, with the exception of this one yard, files any tariff for loading and unloading.

I expect to prove that all of these stock yards perform precisely the same services for the railroads that we do, with the exception of some of the smaller yards where they are not so extensive.

I expect to prove that some of these yards, especially the larger ones, were organized just as our company was organized originally, both as a railroad and as a stock yards company; that at least in one, possibly three cases, after the decision in the Pfaelzer Case, while these yards companies were performing the railroad work themselves, they filed tariffs for loading and unloading, just as the Stock Yards Company did; that these stock yards have since divested themselves of their railroads by transferring their railroads to subsidiary companies, of which they own all the stock, and thereupon they cancelled their loading and unloading tariffs with the Interstate Commerce Commission and never [fol. 467] have had them in since.

In other words, the Commission permitted and acquiesced in, and still permits and acquiesces in all of those other companies, when the relationship is much closer, because the subsidiary railroads in these other cases, whose stock is owned by the Stock Yards Company, performs the service, and you have never required any such thing of them.

I expect to prove all that and to prove, among other things, contemporaneous interpretations by the body charged with the enforcement of the law. I cannot conceive any valid objection being made to that character of evidence. Surely the Commission would like to have before it, for the purpose of comparison, its present attitude towards this company and the attitude in previous years and to know the entire history. I doubt if the Commission appreciates how this practice is carried on or how it has grown up.

I expect to prove, also, that in the great majority of these cases they have no tariffs for either loading or unloading filed with the Secretary of Agriculture, but that a few have. This witness' testimony with respect to it was simply to say that another witness will be produced who will have all this information. I am perfectly willing to meet that now or at any other time, but he is not going into a very accurate, far

[fol. 468] reaching, comprehensive statement of what is done at each of the other stock yards in the United States.

Examiner Carter: Do you want to have him withdraw that statement, if you are going to present this statement later by another witness?

Mr. Shaw: I think I would like to have him read it. If you want to strike it out, well and good.

Mr. Smith: Counsel expresses a willingness to have this question determined now.

Mr. Shaw: There is more in this testimony besides that one statement in Mr. Henkle's testimony, which I think the Commission should receive before he finishes.

Examiner Carter: You mean, dealing with the question of the other stock yards?

Mr. Shaw: I beg your pardon?

Examiner Carter: You say there is more than his testimony.

Mr. Shaw: There is just one sentence there. His statement with respect to that is immaterial. There are just two or three sentences more.

Commissioner Splawn: If it is immaterial, if you admit that that sentence is immaterial, why go into it?

Mr. Shaw: For the purposes of this witness.

Commissioner Splawn: It will be stricken, and the witness will resume his statement.

Mr. Shaw: Immaterial so far as this witness is concerned. [fol. 469] I do not attach any importance to it.

Commissioner Splawn: Very well. That is to say, that he is not competent to testify about that matter. The witness will omit that sentence and will resume his statement.

Mr. Smith: Mr. Commissioner, now that we have started on the discussion of the admissibility of this evidence, would the Commission[illegible] willing, in the light of Mr. Shaw's statement that [illegible] perfectly willing to meet now, permit us to proceed with that and reach a conclusion as to the admissibility of such evidence?

Commissioner Splawn: Yes, I am willing to make a ruling at this time, if Counsel so desires.

Mr. Smith: I would like to be heard just a moment more on that.

The statement of the Supreme Court of the United States in Adams versus Mills, to which I wish to call the Commission's attention, is as follows, and I direct the Commis-

sion's attention to the fact that it was the situation at Chicago that was before the Supreme Court in that case and the situation at Chicago alone, where the Court said:

"Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. The decision of the question [fol. 470] was dependent upon determination of certain facts including the history of the stock yards and their relation to the Line Haul Carriers, the history of the unloading charge at the yards and the action of the parties in relation thereto."

The Supreme Court has said, "At the yards."

Mr. Henkle has testified at some length this morning, perhaps some two hours, delineating these facts at Chicago, which the Supreme Court says are determinative of this question, along with the questions of law which are involved.

Now, in the petition for reconsideration which was filed in Docket No. 4109 and which is a part of this record, respondent in that proceeding set out at considerable length what the situation was at various of these other points, and the Commission declined to hear that showing or to receive that showing as germane to the issue here.

I direct the Commission's attention to the fact that we are pursuing wholly collateral questions when we attempt here, or should attempt here to go into all the various questions, the history of the relationship between the Yards Company and the railroads, which the Supreme Court says is determinative of the question at the particular point at which the question arises.

The Commission cannot possibly probe all those facts [fol. 471] and determine all these collateral issues in this proceeding. It is wholly irrelevant, and we stand upon that objection.

Mr. Shaw: Of course, when it comes to the decision of Adams versus Mills, suffice it to say that that entire controversy arose prior to 1921, when the condition was entirely different and when the practices were entirely different in the yards than they are now and have been since 1922, when the lease was made.

Commissioner Splawn: You are relying upon this lease as to that?

Mr. Shaw: And with the practice which has since ensued, and with the practice to which the Commission gave its ap-

proval in other yards, where precisely that was true. I am offering this evidence for two different reasons. One is to show that the Commission, possibly unintentionally, is discriminating against this company in favor of every other company in the United States, and, secondly, to show that the Commissioners themselves have made a contemporaneous interpretation of the Interstate Commerce Act and the Packers and Stock Yards Act, which has occurred since 1922.

Commissioner Splawn: Counsel is competent to argue the law to the Commission and it is not necessary to call in a witness to testify to the law.

Mr. Shaw: I cannot argue the law without the facts, and [fol. 472] I cannot get the facts unless I put them into this record, for the same reason that counsel wanted these other decisions in the record. I cannot argue the law as applying to the facts without the facts being there.

Commissioner Splawn: The facts as to the practices at Chicago are here under investigation. You can put on witnesses to show what the practices are at Chicago.

Mr. Shaw: Do you mean to tell me that the Commission would be unwilling to have me prove in a record before the Commission what the Commission's practice is with respect to activities at other yards which cannot be distinguished? I cannot believe that you would take any such position as that. The whole theory of rate-making which has grown up with the Commission has been a series of bases of comparisons, ever since the Commission started, and I cannot conceive it possible that the Commission would prohibit me from proving here facts which the Commission has taken into consideration and has approved of, which cannot possibly be distinguished. I cannot argue that unless I can prove the facts.

Commissioner Splawn: The statute defines "a common carrier by railroad." That definition has been construed by the Commission and by the Courts.

Mr. Shaw: One of the most potent arguments in the interpretation of laws is the contemporaneous interpretation [fol. 473] made by the body charged with their enforcement, and I propose to show, before we get through, that the contemporaneous interpretation by the body charged, when there is a change of status, goes to prove that with the change of status the change in the legal result necessarily follows.

Commissioner Splawn: In any such orders of the Commission as to which counsel now alludes, counsel would cite, and those orders and reports, made a part of the order, speak for themselves.

Mr. Shaw: The order of the Commission or the practice of the Commission would be perfectly futile unless the facts upon which the Commission acted or failed to act were also before the Commission. That is what I expect to prove, but not by this witness.

Commissioner Splawn: The orders, Mr. Shaw, are accompanied by reports which are made a part of the orders, and the Commission states the facts in its reports upon which it bases its orders, as you will know.

Mr. Shaw: There are many places where the Commission did not act at all. I will give you an illustration. Shall we take this up now or go on with this witness and finish with the cross examination?

Mr. Smith: I think we ought to conclude with it. My contention is that the full Commission has said that it does not want to hear this. On page 14 of its petition for re- [fol. 474] hearing the respondent begins to delineate in Docket No. 4109 the testimony which it now desires to offer, and the Commission said that they would not reopen the case and hear it and by this strategem of refiling the tariff the respondent says, "We are going to make you hear it whether you want to or not."

Mr. Shaw: I do not consider, and of course it is not the law, that the failure to grant a rehearing in one situation is any indication as to what the Commission would have done with respect to evidence if it had been presented in that case.

Mr. Smith: It is the same tariff which you are asking to be withdrawn.

Mr. Shaw: Be patient.

Commissioner Splawn: One at a time, please.

Mr. Shaw: A year has elapsed. Since that time the Stock Yards Company acquiesced in it, or, if you please, attempted to take advantage of the fact that it was a common carrier, and filed a joint tariff, and you promptly suspended that, so that it is now neither fish nor fowl nor good red herring, but in any event this is another case, and, with the greatest respect, it is the duty of the Commission and still later of the Courts, if I take it there, to decide the Case on this record which is being made here.

I propose to show in this record that the contempor-
[fol. 475] aneous interpretation of the Commission how other yards, which cannot possibly be distinguished, are treated, forces the conclusion that this particular yard under a like interpretation of the statutes is no longer a common carrier by railroad.

The Commission has committed itself to it, but it has committed itself to it both by action and by non-action.

For instance, take the case at Kansas City, Missouri. All the stock yard facilities, including the railroad, were originally owned and operated by the Kansas City Stock Yards Company of Maine, under one corporate ownership. It later segregated the railroad facilities and allocated them to a railroad incorporated and known as the Kansas City connecting railroad company, whose stock was owned by the Kansas City Stock Yards; that the two companies have common officers.

Commissioner Splawn: From what report are you reading?

Mr. Shaw: The Stock Yards Company has an arrangement with the railroad where it has continued to perform the service of loading and unloading.

Skipping some, the Kansas City Stock Yards under its Maine Charter is authorized to construct and operate a Railway Company to serve its property, when the state law permits, that is, to serve the Union Stock Yards properties located in Kansas City, Missouri.

[fol. 476] At one time that Kansas City Stock Yards while operating both its yards and its railroad under the parent concern, with common ownership and name, filed a tariff with the Interstate Commerce Commission. The tariff precipitated a fight against the tariff by certain trunk lines. As a result of that decision by the Commission the tariff was stricken from its files and the yard company never thereafter has filed any tariffs with the Interstate Commerce Commission.

Commissioner Splawn: In what volume of the reports do you find that?

Mr. Condit: It is not in the statement.

Mr. Shaw: It is in another statement which I am going to give.

Commissioner Splawn: I have not yet gotten the volume and page of that report, Mr. Shaw, from which you were reading just then.

Mr. Shaw: I do not think I gave the volume and page.

Examiner Carter: Would you mind giving it?

Mr. Shaw: I will in just a second.

Examiner Carter: Is that 33 I. C. C. 92?

Mr. Shaw: Get it out of one of the briefs. I am sorry I cannot answer it right off.

Mr. Smith: Is it not the one to which Commissioner Meyer referred in his dissenting opinion?

[fol. 477] Mr. Shaw: Yes, sir.

Examiner Carter: That is the one?

Mr. Shaw: I took it from another one here.

Commissioner Splawn: From what report are you reading?

Mr. Shaw: This will not be in any report, but you can see the significance of it. I will give you the Kansas City report in a few minutes.

Mr. Smith: I want to give the counsel some latitude in making an offer of proof, if he is offering proof, but I do not want these facts put into the record through counsel to which we object, any more than we want them in the record in the appropriate way through a witness.

Commissioner Splawn: That is an appropriate objection, Mr. Shaw.

Mr. Shaw: As a matter of fact, if the Commission for the first time in its life, refuses to put into a record which may be going into court what it has done in other cases, I am frank to say that I expect to stand here all afternoon and to offer proof, but I do not expect to do that. I do not expect you to discriminate against me for the first time in a way that I have never seen happen before the Commission.

Commissioner Splawn: The Commission is not going to discriminate against you or anyone else, Mr. Shaw.

Mr. Shaw: I say that the comparative activities at other [fol. 478] yards are the strongest possible evidence, and I cannot prove contemporaneous interpretation in any other way, and even if you were administering a ruling on the introduction of evidence, when I offer proof of contemporaneous interpretation, I have a right to accumulate all the evidence that I can get in support of the doctrine of contemporaneous interpretation. That is where I predicate this myself, quite aside from the personal equation or a legally sound position which cannot be controverted.

Commissioner Splawn: Now, on the doctrine of contemporaneous interpretation, our interpretations are set forth in reports. You have cited one. That speaks for itself. You of course, will cite other reports which you believe support your position as to the situation at Chicago, but it is not necessary to go behind those reports and here undertake to retry or rehear those proceedings.

Mr. Shaw: I agree with that distinction, but, for instance, you take the case of the National Stock Yards, down at East St. Louis. This was a case where the Stock Yards Company owned both the railroad and the stock yards, and it had tariffs on file. I will read one or two sentences because I do not want to bother you too much right now.

Mr. Smith: I want to make the same objection as I did before.

Commissioner Splawn: Will you give the volume and [fol. 479] page of that report?

Mr. Shaw: That is the difficulty. There is no volume and page, and I am telling you as a matter of historical fact.

Commissioner Splawn: Mr. Shaw——

Mr. Shaw: If you will pardon me just a second, Mr. Commissioner Splawn, take the case at East St. Louis where they, after the Pfaelzer Case, where they owned both the railroad and the Stock Yards, they filed a tariff with this Commission. Later they divested themselves of the railroad and withdrew the tariff from the Commission, and have never filed one since, and you permitted it. There is no record about it. There was no litigation about it. They just came down here and you permitted it. How could I prove that out of any volume?

Commissioner Splawn: The fact that that was done indicates merely that the Commission was clear as to that particular tariff, and certainly when you bring a tariff here, as you have done, after investigation the Commission will decide whether or not your tariff is lawful or unlawful. In passing upon that issue we are not required to go through our tariff files and check and try cases which were not protested and which were not tried at the time. You, in effect here, are asking us to try a case with reference to [fol. 480] some tariff which you say was filed with respect to the stock yards in East St. Louis, in order to see whether or not it is on all fours with something at Chicago.

Mr. Shaw: No, I am not trying to do that. I am trying to prove that at like stock yards—I will change my sentence.

The cumulative effect of the failure of the Commission to require any other stock yards in the United States to file a tariff for its loading or unloading charges with the Interstate Commerce Commission, the fact that some six or eight of the other 135 stock yards in the United States filed their tariffs for loading or unloading with the Secretary of Agriculture, without challenge on the part of the Commission, which I expect to prove; the fact that outside of those 33 who filed their tariffs, out of the whole 136, with the Secretary of Agriculture for loading and unloading——

Mr. Smith: I object to that statement of counsel.

Mr. Shaw: All the rest of the charges are absorbed.

Out of the large number of these companies there were many organized with charters just like ours, with the dual capacity of operating a railroad and a stock yards, and when they got rid of the railroad, even though they owned all the stock of the railroad, the Commission then permitted them to withdraw their tariffs and never required them to [fol. 481] file a tariff again.

Does not the Commission want to have that in the record, the cumulative effect of that in the record, which will enable me to go into the courts and say, "Why should the Commission rule this way against my company when it has ruled in favor of all the other companies?"

Commissioner Splawn: Whether or not the Commission erred or was correct with reference to some other tariff is not in issue here. The issue before the Commission is whether or not the suspended tariffs are lawful. The statute is clear as to what is a common carrier by railroad. That definition has been construed. The Commission is compelled to pass upon the status of your company upon the record you make as to its situation and practices.

Mr. Shaw: At the proper time, if the Commission adheres to this, I expect to offer this evidence—I do not know what your ruling will be when we get to it, but I suggest now that we let this witness go on and be cross examined.

Commissioner Splawn: And he will withdraw the sentence which he gave?

Mr. Shaw: I make the offer of proof that the respondent, if permitted to say so, will say, that is, that the witness would say that the respondent is one of 136 public stock yards throughout the United States and is so designated by the Secretary of Agriculture. The respondent's service in [fol. 482] loading and unloading live stock does not differ

from that performed by any other public stock yard in the United States. No other stock yard is required to file a tariff.

I offer to make that proof by this witness.

Mr. Smith: I am going to object to any offer being made in that form. In short, I am going to object to an offer which undertakes to put into this record verbatum the very testimony upon which the ruling of the Commission is sought. I am perfectly willing to have Mr. Shaw make his offer in a way adequate to suit himself, to show with such precision as may be necessary the type of evidence that he desires to put before the Commission here and to have a ruling on that offer.

Mr. Shaw: I propose to prove that by this witness, and to let you cross examine him if it goes in. Then you will see whether it is good or not.

Also I propose to prove the same thing by a very much better informed witness, as I say, the best informed man in the United States, and I expect to put it in just as he would swear to it. I am sorry if counsel objects to the form of the offer, but I cannot put it in another form. That is the way I make it, and that is where it stands, and that is the way it is going into this record, if the stenographer writes it up.

[fol. 483] Mr. Smith: In other words, if your Honor please, we object very seriously to the form of such an offer. It is not important with reference to the witness, perhaps, but Mr. Shaw says he is glad to have this question determined at this moment, and he has said that he proposes to be here all afternoon reading this testimony which he desires to offer into the record, as his offer of proof.

That is not a good offer to prove, and we object to it on the ground that it is not an offer to prove at all, but is a method of circumventing the determination of this issue on the question of evidence by the Commission.

Mr. Shaw: Let the record show that the witness is on the stand and I offer to prove by him that he would swear to the very things which I have read, if permitted.

Commissioner Splawn: I sustain the objection and will ask Mr. Shaw when you offer testimony that you merely state the character of it and not undertake to put on the record the details which you would like to have the witness testify to.

Mr. Shaw: To which we take note as the most technical requirement of a court of justice would be. I have never had that happen to me before when before the Commission.

I propose to ask this witness how many other stock yards there are in the United States. I expect to prove by him that he will say 136.

[fols. 484-485] Commissioner Splawn: Now, Mr. Shaw, you are a very able and skilled counsel. You are here to help the Commission. I ask you to state the general purpose of your testimony and not to undertake yourself to testify.

Examiner Carter: One of the counsel has collapsed.

Commissioner Splawn: We will recess, gentlemen, until further notice.

(Thereupon, at 12:20 o'clock p. m., a recess was taken until further notice.)

[fol. 486] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. and S. Docket, No. 4296

Cancelation of Livestock Services at Chicago

Chicago, Illinois, June 10, 1937. 10 a. m. (D.S.T.)

Before Paul O. Carter, Examiner, Interstate Commerce Commission

Met Pursuant to Notice

Appearances:

Ralph M. Shaw and Guy A. Gladson, 1400 First National Bank Building, Chicago, Illinois, appearing for Union Stockyard & Transit Company of Chicago.

R. C. Fulbright, 838 Transportation Building, Washington, D. C., and Bryce L. Hamilton, 1400 First National Bank Building, Chicago, Illinois, appearing for respondent, Union Stockyard & Transit Company of Chicago.

Kenneth F. Burgess, Douglas F. Smith, and C. Daggett Harvey, 11 South LaSalle Street, Chicago, Illinois, appearing for protestants.

Luther M. Walter, 2106 Field Building, Chicago, Illinois, appearing for St. Louis National Stockyards Company.

A. Z. Baker, 3200 West Sixty-Fifth Street, Cleveland, Ohio, appearing for American Stock Yards Association, eastern division.

[fols. 487-489] Lee J. Quasey, Charles E. Blaine, Charles Stewart, and F. R. Marshall, 160 North LaSalle Street, Chicago, Illinois, appearing for National Live Stock Marketing Association; American National Livestock Association; National Wool Growers' Association; and Texas Southwestern Cattle Raisers' Association.

John A. Zelinski, Washington, D. C., appearing for United States Department of Agriculture, Bureau of Animal Industry, Packers & Stockyards Division.

[fol. 490] Proceedings

Examiner Carter: Come to order, gentlemen.

The Interstate Commerce Commission has set for further hearing at this time and place, Investigation and Suspension Docket No. 4296, Cancelation of Livestock Services at Chicago.

A hearing was held in this case at Washington on February 11, 1937, and due to the unfortunate illness of one of counsel the hearing was postponed from that date until a later date, and at the request of respondent's counsel the further hearing in this case has been postponed from time to time until today.

Are there any appearances in addition to those made at the former hearing?

Mr. Fulbright: R. C. Fulbright and Bryce L. Hamilton, for respondents.

Mr. Gladson: I want to enter an appearance for respondents, Guy A. Gladson.

Mr. Walter: Luther M. Walter, 2106 Field Building, Chicago, Illinois, appearing for St. Louis National Stockyards Company.

Mr. Baker: A. Z. Baker, 3200 West Sixty-fifth Street, Cleveland, Ohio, appearing for American Stock Yards Association, eastern division.

Mr. Zelinski: John A. Zelinski, appearing for U. S. Department of Agriculture, Bureau of Animal Industry, Packers and Stockyards Division.

[fol. 491] Exam. Carter: Are there any other appearances?

Mr. Quasey: Lee J. Quasey, Charles E. Blaine, Charles Stewart, and F. R. Marshall, appearing for National Live Stock Marketing Association; American National Livestock Association; National Wool Growers' Association, and Texas Southwestern Cattle Raisers' Association.

Exam. Carter: Mr. Smith, do you want to enter any additional appearances?

Mr. Smith: I will enter an appearance for Mr. C. Daggett Harvey, in addition to those already shown on the record.

Exam. Carter: Are there any other appearances?

(No response.)

Exam. Carter: At the last hearing, Mr. O. T. Henkle was on the witness stand. Do you gentlemen desire to have him proceed?

Mr. Smith: Yes.

Mr. Gladson: Mr. Examiner, the answer to that is "yes", I want to recall Mr. Henkle, but before I do that I would like to know just who Mr. Smith represents. I have read the transcript of the testimony and I was unable to ascertain that fact from the transcript, and I wonder if Mr. Smith does not want to state on the record who his clients are?

Mr. Smith: Mr. Burgess, Mr. Harvey, and I represent the carriers who protested this tariff, and who are named in that protest. Do you want the names copied in the record?

[fol. 492] Mr. Gladson: I would like to have the names in the record.

Mr. Smith: I hand the reporter a copy of the protest in this proceeding and ask him to copy the names of the carriers into the record, that we represent, as follows:

Atchison, Topeka & Santa Fe Railway Company; Charles P. Megan, trustee, of Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings, and George I. Haight, trustees, of Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees, of The Chicago, Rock Island & Pacific Railway Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

Mr. Gladson: I will recall Mr. O. T. Henkle.

O. T. Henkle, previously sworn, resumed the stand and testified further as follows:

Direct examination (Continued).

By Mr. Gladson:

Q. In reading the transcript of the proceedings in Washington on February 11th, I find that exhibits 2 to 6, inclusive, were not offered. I want to offer them at this time, Mr. Examiner.

Exam. Carter: Any objection?

Mr. Smith: No objection.

Exam. Carter: They will be received.

[fol. 493] (Respondent's exhibits 2 to 6 inclusive, Witness Henkle, received in evidence.)

Mr. Gladson: At the request of Mr. Smith, certain exhibits were furnished to the Commission after that hearing had adjourned. They were exhibits 7 to 17, inclusive. It is my understanding that they have been received, but I would like to have that shown on the record.

Exam. Carter: They have been received.

Mr. Gladson: They have been received?

Exam. Carter: Yes, sir.

Mr. Gladson: Now, in connection with Mr. Smith's request for exhibits which arose out of Mr. Henkle's testimony as to the position of the Stockyards Company in I. and S. Docket 4244, I find that there are certain other exhibits that probably should be in this record in order to make the record complete.

I have in mind the petition for rehearing filed by the Stockyards Company before the Commission. I would like to have that marked for identification as respondent's exhibit 18.

Exam. Carter: That is the petition for rehearing in I. and S. 4244?

Mr. Gladson: That is the petition for rehearing in——

Exam. Carter: Or in I. and S. 4109?

Mr. Gladson: No, it is in Docket No. 24375, which is the so-called Hygrade Case.

[fol. 494] Exam. Carter: Any objection?

Mr. Smith: No objection.

Exam. Carter: It will be received.

Mr. Smith: I have not received a copy of that, however.

Mr. Gladson: I have only the original copy. I would like leave to withdraw this and have photostatic copies made thereof so that I may supply Mr. Smith with his copy.

Exam. Carter: That exhibit cannot be withdrawn if it is introduced.

Mr. Gladson: Suppose I simply have it marked for identification, then.

Exam. Carter: That is strictly against the Commission's rules. A document once marked as an exhibit cannot be withdrawn. Do you think you could have that done during the course of the hearing?

Mr. Gladson: I think we can.

Exam. Carter: Then suppose you take that back.

Mr. Gladson: Yes, sir; I will withdraw my offer of the exhibit.

I would like at this time to offer for identification the brief in behalf of the Union Stock Yard & Transit Company of Chicago in the Hygrade Case in the United States District Court, Southern District of New York.

Exam. Carter: Have you sufficient copies of that?

Mr. Gladson: Yes, I have sufficient copies of this exhibit.

[fol. 495] Exam. Carter: That will be exhibit No. 18.

(Respondents' exhibit No. 18, Witness Henkle, received in evidence.)

Mr. Smith: With respect to these briefs of the Yards Company in other proceedings that are being offered and which are, of course, self-serving documents, may we understand that you are not attempting to put in those records as facts to be considered by the Commission, or any assertion of facts which may appear in those briefs, but your only purpose is to show what the position of the Yards Company was with reference to questions of law in those proceedings?

Mr. Gladson: As to these particular exhibits I have asked to be marked within the last 2 or 3 minutes, yes.

Mr. Smith: I will ask you if that is true with respect to all of the briefs or pleadings which the Yards Company has offered here on its own motion as exhibits in this proceeding, are you attempting to get into this record as facts certain alleged facts as stated and set forth in those documents?

Mr. Gladson: As to the exhibits that you requested, Mr. Smith, that have already been received in evidence, I expect to use them for any purpose for which they may be valuable.

Mr. Smith: Did you hear my question? You understand I referred to all of the briefs which you offered.

Mr. Gladson: As to the exhibits that we originally produced, not at the request of Mr. Smith, that is true. As to [fol. 496] the exhibits we did produce at the request of Mr. Smith, there is no limitation on the use which we expect to make of them.

Mr. Smith: Of course, I shall undertake to see that certain limitations are proposed to the use of them, but you can take care of that.

In this connection also, I had some discussion with Mr. Hamilton about one of your other exhibits, which was a brief filed by the Yards Company in the Supreme Court of the United States. I found afterwards, Mr. Hamilton, that we have one copy of that brief, which I had borrowed, and I have returned it, so I will desire a copy of that exhibit.

Exam. Carter: Will you designate what exhibit that is? Do you recall?

Here is the docket in which you can find it.

Mr. Hamilton: It is exhibit No. 14, brief of the Yard Company in the Supreme Court in the Hygrade Case, The Atchison, Topeka & Sante Fe Railway Company v. the United States of America.

Mr. Smith: That is correct.

Mr. Hamilton: So if you haven't a copy, I will see that it gets to you, or if we do not get it to you I will see that my copy is available to you whenever desired, if that is satisfactory.

Mr. Smith: Yes.

Mr. Gladson: I will ask to have marked as respondents' [fol. 497] exhibit No. 19 copies of a stipulation between the Government and the Stock Yard Company and the order of the court entered in I. and S. Docket No. 4109. The purpose of this offer of the stipulation is simply to show that the court proceeding in that case was dismissed by agreement with the Government, without prejudice.

Exam. Carter: Any objection?

Mr. Smith: I take it, Mr. Gladson, you did dismiss that proceeding?

Mr. Gladson: We did dismiss that proceeding.

Mr. Smith: And that was in response to a motion by the Yard Company?

Mr. Gladson: It was in response to a stipulation between the Government, the Interstate Commerce Commission, and the Yard Company.

Mr. Smith: Well, in addition to the stipulation, I assume there was a motion for dismissal filed by the Yard Company?

Mr. Gladson: I do not recall whether it was a motion or whether it was simply a slip which showed that the stipulation had been entered and that parties desired the order entered.

Mr. Smith: I haven't any objection.

Exam. Carter: Exhibit No. 19 will be received.

(Respondents' Exhibit No. 19, Witness Henkle, received in evidence.

Mr. Gladson: I would like also have marked as respond-
[fol. 498] ents' exhibit No. 20 a copy of the brief and argument of the respondents, one of whom was the Union Stockyards, in I. and S. Docket No. 4244.

The purpose of this exhibit is to show that before the Commission in I. and S. Docket 4244 the respondent in this case took the position that it was not a common carrier.

Mr. Smith: I have no objection to the admission of this document as an exhibit, providing the Yard Company, to complete the picture, also offers as an exhibit its reply to the protest. I think, strictly speaking, that the Yard Company did not join in that reply but it was prepared and filed by counsel who represent both the Great Western, as shown in this brief, and the Yard Company, and referred to the position of the respondents in that proceeding, and I assume that counsel will have no objection to putting that in the record also.

Mr. Gladson: Well, we cannot agree to what Mr. Smith has suggested, because the Stock Yard Company did not join in the answer to that protest.

Mr. Smith: We ask that that reply brief be made part of the record here in conjunction with this exhibit which counsel is offering.

Mr. Gladson: Why, I object to that because the Stock Yards Company was not a party to that reply.

Exam. Carter: You were a party to the joint rates, were you not?

[fol. 499] Mr. Gladson: We were a party to the joint rates, but not a party to that reply.

Exam. Carter: If you gentlemen are willing to file that in connection with exhibit No. 20, we will incorporate that as a part of the record. It would make the record more complete and be easier to handle if you could let us have copies of that protest.

Mr. Gladson: The Stock Yards Company have no copies; they were not a party to that protest.

Exam. Carter: It would not be very hard for you to get the copies, do you think it would?

Mr. Gladson: What is that?

Exam. Carter: I say it would not be very hard for you to get the copies, would it? Mr. Walter, would you be willing to furnish Mr. Gladson with copies of the reply of the Yards Company to the protest of the Chicago Great Western in I. and S. Docket 4244?

Mr. Walter: I will be very glad to. How many copies?

Exam. Carter: Two for the Commission and one for counsel.

Mr. Walter: Who is offering the exhibit? Are you offering it, Mr. Gladson?

Mr. Gladson: No, not the respondents. I wouldn't care to do that.

Exam. Carter: The Commission is making the request.

Mr. Walter: It is at the request of the Commission?

[fol. 500] Exam. Carter: Yes.

Mr. Walter: I will be glad to do that on the request of the Commission. I will do that at the noon hour.

Mr. Gladson: And I want to reserve an exception to that, because we refuse to be bound by what the trustees of the Great Western may do in another case.

Exam. Carter: Note the exception, Mr. Reporter.

Mr. Walter: Well, the trustees never got very far along with that. That is off the record, Mr. Reporter.

Exam. Carter: I want to state this, gentlemen, that the record is strictly under the control of the examiner and the reporter has received instructions accordingly.

Now, you may proceed.

Mr. Gladson: Have the exhibits been received?

Exam. Carter: I have received exhibits 18 and 19, and if there is no objection I will receive exhibit 20, and, as I understand it, at the noon recess Mr. Walter will furnish three copies, two for the Commission and one for counsel, of the reply to the protest of the Chicago Great Western in I. and S. 4244.

Mr. Smith: That will be exhibit No. 21, will it?

Exam. Carter: It is against the rules to number an exhibit before we have it before us, so I would rather stick to the rules.

By Mr. Gladson:

Q. Are you the same Mr. Henkle who previously testi-
[fol. 501] fied in this case?

A. Yes, sir.

Q. And have you since the last hearing read the transcript of testimony in this case?

A. I have.

Q. And do you want to make certain explanations or corrections?

A. There are one or two points which I think it might be well to clarify, as far as my language and my thoughts were concerned.

In the previous record I used the word "acquiesce" in connection with the decisions and findings of the courts and the Commission——

Mr. Smith: Would you mind referring to the pages and paragraphs which you are going to change here?

The Witness: I believe it was page 24.

Mr. Gladson: He has not indicated, Mr. Examiner, that he is going to change it. I think, perhaps, that is an unfortunate word.

The Witness: On page 16 of the stenographer's notes of the hearing on February 11, I stated that "The Yards acquiesced in the conclusion of the Commission made in 1919." The thought that I intended to convey was that we complied with the terms of the finding, without acquiescing, because we had at that time, and both before and since, in mind in our own minds that we are not a common carrier, so that [fol. 502] the words did not quite express the thought that I had in mind, or that I intended to convey.

Q. You had in mind that you were quiescent for a while instead of acquiescent?

A. Well, there are differences in the meanings of various words. Quiescent might more nearly describe it. We might say we submitted under protest, or something of that sort.

Mr. Smith: I am willing to have counsel write out just what you meant and put it in the record, if that is satisfactory.

The Witness: Mr. Smith, I am endeavoring to explain myself just what it meant.

By Mr. Gladson:

Q. Mr. Henkle, you made the statement at page 13 of the transcript, that the first tariff filed by the Stock Yards Company included the statement that you were performing the service as agent of the railroads. Do you want to correct that statement?

A. I do. I was speaking of the period more than 20 years ago——

Mr. Smith: Will you excuse me just a moment until I get where that statement was made?

Mr. Gladson: At the bottom of page 13.

Exam. Carter: The last sentence on the page.

Mr. Smith: Thank you.

The Witness: Now, how far had I gotten with my answer?

(Answer read.)

[fol. 503] The Witness: And I was in error in stating that the first tariff contained the phrase "as the carriers' agent." That was in tariff No. 2. It was not in tariff No. 1, but has been in all tariffs for approximately 20 years, and so I had overlooked that earlier period.

By Mr. Gladson:

Q. What was your thought about whether or not you were doing this work for yourselves, or as the agent for the carriers, during the period when the statement did not appear in the tariff?

A. Well, we have always been of the same opinion, that we were not common carriers.

Q. And were you doing the work on your own behalf or for the railroads?

A. On our own behalf.

Q. Will you read that question and answer, Mr. Reporter?

(Question and answer read.)

A. No, on behalf of the railroads, I meant to say.

Q. Since the last hearing, Mr. Henkle, have you made a further study of matters involved, and are you prepared to make a further statement?

A. I am. It is really a continuance only of where I stopped before.

Q. Will you proceed in your own way?

A. In its report in I. & S. Docket 4109 the Commission several times referred to the fact that the Stockyards Com-[fol. 504] pany would not permit the railroads to perform their own loading and unloading service.

The services which the Stockyards Company performs for the railroads are essentially stockyards services or are incidental to the rendering of stockyards services. What-

ever the law or the lawyers may say about the legal character of loading or unloading of livestock at public markets, it is in its nature a stockyards, not a railroad service.

Loading and unloading facilities must be immediately adjacent to or a part of the yards where the stock is bought or sold. Livestock is a perishable commodity, the bulk of which must be sold on the day of arrival. It shrinks if driven on foot any considerable distance and may become stale and less valuable if held over.

Inbound shipments must be unloaded and moved out of the way promptly to prevent delay to following trains. They must reach the pens of the commission men in sufficient time to permit the animals to be sorted, fed, watered, and otherwise prepared for the market which opens early in the day. Most of the rail stock arrives between midnight and daybreak.

It might be practicable for the railroads to own their own loading and unloading facilities, but they would have to have more facilities to take care of their peak demands than are used specifically for this purpose by the Stockyards Company. As it is, many of the alleys and pens used in this [fol. 505] service can be and are used for other stockyards purposes.

As a practical matter, the railroads could not perform this service efficiently, and the respondent could not properly serve its non-railroad patrons if it permitted the railroads to try. Loading and unloading must be done by a personnel long trained in the handling of livestock. The stock must be driven out of the cars, across the unloading platforms, and down the chutes quickly and without injury to animals or men. This must be done in all kinds of weather and at all hours of the day.

The work would be extremely hazardous for an inexperienced man. Much of the western stock has never been confined even in a pen before it started on its railroad journey. Many of the bulls shipped to market are powerful and vicious. Anyone who has tried to drive a single calf in his boyhood days can easily conceive of the art and experience required to handle a carload.

Sheep are reluctant to enter a pen that has been occupied by other animals and have other idiosyncrasies. Only one with long practical experience and knowledge of sheep psychology can load or unload them efficiently. Even the

employees of the packers, mostly men with experience in handling sheep, sometimes have to use a trained goat to make their task easier.

Cars of hogs, cattle, calves, and sheep are likely to be [fol. 506] found in nearly every train and often different kinds of stock are found in the same car.

The animals must be counted when driven out of the chute pen in the alley. The alley in front of the chute pens is one of the important ground-level thoroughfares in the yards, is nearly always in use, and there can be no delay in counting animals out of the chute pens into it without tying up traffic along the line. Most of this counting is done at night. It must be done accurately and quickly. Only an expert can count animals, particularly sheep, hogs, and calves, quickly and accurately under these conditions. The counting of sheep is not done by individual animals but in small groups, and the same is true as to hogs.

The men who handle yard stock from the chute pens must know how to handle stock in the alleys to prevent mixes, to prevent impeding other traffic, and to prevent other losses, and they must be thoroughly familiar with the location of pens, alleys, inclines, and viaducts, not only those used in this service but used in handling other yard animals.

They must also know the location of cross-gates and be familiar with their operation to stop any run-away animals or groups of animals. They must also know the rules and regulations and practices obtaining at the yard and be able to keep the records required.

The employees of the Stockyards Company have been [fol. 507] trained in this work for years. The original employees handling the loading, unloading, and yarding of railroad stock at the time the yards were opened in 1865 were largely men who had been engaged in livestock production on farms and ranches. These men were succeeded by their sons and there are now many families whose third generation is engaged in doing the same work done by their grandfathers.

Most of the men employed in loading or unloading have had long experience in other stockyards services and have learned to handle and count livestock, know the rules and regulations, and practices of the yards, know how to prepare its records, know the physical layout, and know the

location of the various firms and facilities of the company. The work of loading and unloading is much the same as these other services.

Even if the railroads could acquire the necessary personnel, respondent could not afford to allow divided supervision of employees in the vicinity of the unloading chutes. The even and efficient flow of traffic essential to successful operation of a livestock market would inevitably be seriously interfered with to the detriment of all the patrons of respondent.

There are other practical objections, such as wage scales and working conditions, which would make it inadvisable for the Stockyards Company to permit the railroads to do this work for themselves on its property.

As confirming my conclusions, another witness, who has [fol. 508] gathered data under my supervision and direction, will show that the railroads do not perform loading or unloading at any of the central markets, except at Buffalo and Detroit, at which point the New York Central Lines operate the entire market as a separate department of the railroad.

The Stockyards Company notifies the consignees of the arrival of railroad stock by following a practice of long standing which has been found to be the most efficient method.

Mr. Smith: Will you wait just a moment, please, while I check this?

Now, on page 5 of your memorandum in the paragraph at the bottom of the page, "The Stockyards Company notifies the consignees," and so forth, I take it you are speaking there of the Union Stock Yard of Chicago, are you?

The Witness: Yes, sir.

Mr. Smith: We move to strike from the record the statement the witness has just made, which begins:

"As confirming my conclusions," as incompetent, irrelevant, and immaterial, and within the ruling the Commission made at the previous hearing herein, sustaining objections to that character of question.

Examiner Carter: Will you just read the sentence? I recall the sentence but I would like to have the sentence in the record at this place.

Mr. Smith: The sentence we move to strike is as follows: [fol. 509] "As confirming my conclusions, another witness, who has gathered data under my supervision and di-

rection, will show that the railroads do not perform loading or unloading at any of the central markets, except at Buffalo and Detroit, at which points the New York Central Lines operate the entire market as a separate department of the railroad."

Mr. Gladson: Mr. Smith, as I read that sentence, that is nothing more or less than a promise of what the next witness is going to show.

Mr. Smith: Well, promises are immaterial and I renew my motion to strike.

Exam. Carter: The motion is granted.

By Mr. Gladson:

Q. Will you proceed, Mr. Henkle?

A. Without going into detail, this practice is composed of three distinct steps, namely, posting of records, announcement from the "pulpit" in the receiving office, and posting on the wall space in the receiving office. Obviously, this method serves to act as notification to the consignee earlier and more efficiently than if the usual notice by mail were given.

It is essential to stockyards operation that such notice of arrival be given promptly to consignees in order to keep the stock moving expeditiously from the chute and holding pens to the pens of the consignees.

In the case of trucked-in stock, the Stockyards Company gives similar notice at the receiving office of the arrival of [fol. 510] such stock as part of its stockyards service.

The Stockyards Company collects freight charges on market stock and remits these charges to the railroads the day after these charges are so collected. In this capacity the Stockyards Company acts merely as a collector of the charges. The charges are computed by the railroads and the Stockyards Company bills the transportation charges of the railroads along with its charges for feed, yardage, and other service.

The bond which the Stockyards Company requires the dealers and market agencies to give it insures the payment of such charges along with other charges. Conceivably, the railroads could collect their own charges as they do from packers on "directs", but the Stockyards Company, as incidental to the collection of its own charges, can do it much more economically and efficiently than the railroads could do it for themselves.

The weights which the railroads use in computing freight charges on market stock are those made by the Stockyards Company in connection with the marketing of the animals.

In the report in I. and S. docket 4109, the Commission commented on the fact that respondent had invoked its jurisdiction on several occasions. This, like the filing of tariffs with the Commission, was not of our own choosing. From the passage of the original act in 1887 to 1912 the Stockyards Company filed no tariffs with the Commission, then only after it was required to do so by the decision of the Supreme Court.

[fol. 511] In 1917 costs of operation had increased to such an extent that increased loading and unloading charges were essential. The Stockyards Company could not afford to absorb the loss that it would have incurred in awaiting the outcome of the litigation necessary to find out whether the Commission had jurisdiction. It, therefore, filed the tariff, publishing the increased charges. This tariff became effective without suspension by the Commission.

Later the Stockyards Company attempted to cancel its tariff on file with the Commission, but by its decision in 52 I. C. C. 209 was compelled to refile it.

In 1921 the Stockyards again came to the Commission in order to get a needed increase in its revenue. The report of the Commission is found in 61 I. C. C. 223. There was little or no opposition from the railroads.

Between 1922 and 1930 the Stockyards Company was so busily engaged in valuation and other proceedings before the Secretary of Agriculture and in the litigation, which finally culminated in the Adams vs. Mills decision, the management did not deem it advisable to incur the expense necessary to litigate the question of its status as a common carrier.

Mr. Smith: May I ask at that point, during that period which you refer to, you did go back to the Commission for an increase in certain charges, did you not?

Mr. Gladson: If you would just wait a minute, Mr. Smith, [fol. 512] the next sentence makes that statement.

Mr. Smith: All right.

The Witness: During this period it tried unsuccessfully again in 1923 to get another increase in its charges. This is reported in 83 I. C. C. 248.

Mr. Smith: Following our practice here, Mr. Gladson, may we make a part of the record that decision of the Commission in 83 I. C. C. 248? That has been done with reference to the other cases that have been referred to.

Mr. Gladson: I have no objection if you want to make it your exhibit, Mr. Smith.

Mr. Smith: May it be understood that that is made a part of the record, please?

Exam. Carter: It may be so understood.

Mr. Fulbright: May I ask if the inclusion of the report is for the purpose of showing any facts recited, or for the purpose of showing the ruling and action of the Commission?

Mr. Gladson: Are you talking to Mr. Smith about this?

Mr. Fulbright: Yes.

Mr. Smith: I suppose they may be used for any purpose which the counsel desires to use them for, and perhaps this particular report will be the same as the use of several other reports of the Commission offered by the respondents at the previous hearing.

Mr. Gladson: Mr. Examiner, as far as this particular [fol. 513] report is concerned, I object to the use of the exhibit for any purpose other than to show what the Commission did.

Exam. Carter: The facts stated in that report would only be the facts in existence at the time the case was submitted, so that it would not have any relation to present facts, unless there is a connecting link showing the facts to be about the same today.

Mr. Gladson: I think that is a fact, Mr. Examiner, and this book Mr. Smith has offered by reference is to be limited to showing what the Commission did in that particular decision.

Exam. Carter: I will allow reference to be made to that report of the Commission for any purpose which is considered material. Now, that is a rather broad ruling, but I think it is clear just how far that report could be used, and the facts stated in that report, as I stated before, were the facts in existence at the time the case was submitted and unless there is a connection made they could not be taken as the facts in existence at the present time. I think the Commission undoubtedly would refer to its own report if it wanted to find the fact.

Mr. Gladson: Not unless that report is made a part of the record. I think it is subject to that objection.

Exam. Carter: I am a little doubtful about that. but in any event I have made my ruling and I will give you the [fol. 514] exception on that.

Mr. Gladson: I do not think I desire an exception. Will you proceed, Mr. Henkle.

The Witness:

In 1930 the Hygrade Case was started and the company was hopeful that the court would decide that it was not a common carrier in that case.

The jurisdiction of the Commission was questioned in the answer filed by the stockyards in its petition for reh-aring and at other times during the proceeding.

The jurisdiction of the Commission was also questioned by the railroads.

In 1934, rather than forego the revenue that it needed, the Stockyards Company filed another tariff with the Commission which the latter allowed to become effective without suspension.

In 1935, after the Supreme Court had failed to decide the status of respondent in the Hygrade case, cancellation schedules were filed which were involved in Docket 4109. The history subsequent to that date has already been outlined by me.

Since the original tariff was filed there has never been a time when we could get an increase in revenue without going to the Commission for authority or forego the revenue and spend substantial sums of money in again litigating the question of our right to be free from regulation by the Commission.

[fol. 515] By Mr. Gladson:

Q. Mr. Henkle, you have referred in one or more cases in your testimony to commissionmen pens or consignee pens. Did you intend to mean that the consignees or the Commissionmen were owners of those pens?

A. I did not. I intended to refer to them as the pens that are customarily used by them under the jurisdiction and direction of the Stockyards Company from day to day.

Q. Mr. Henkle, have you made an investigation to ascertain whether or not the respondent in this case has ever exercised its power of eminent domain as a railroad?

A. I do not personally know of any such case and I have been unable to find in the history records of the company, any evidence of its ever having exercised such a right.

Mr. Gladson: You may cross-examine.

Cross-examination.

By Mr. Smith:

Q. Are you undertaking to say in that statement that it has not?

A. Yes, sir.

Q. Now, you referred just a moment ago to a tariff which you filed in 1934. What was that tariff? You did not say.

The Witness: Have you got that, Mr. Hamilton?

Mr. Hamilton: Let the record show I have just handed the witness exhibit No. 7.

The Witness: Effective December 1, 1934, we filed I. C. C. No. 12, cancelling I. C. C. No. 8.

[fol. 516] By Mr. Smith:

Q. That tariff increased the charges previously in effect for the loading and unloading services, did it not?

A. Yes, sir.

Q. On page 39 of the transcript, you said, discussing the activity and function of the Yards Company:

"Its only activity consists in furnishing a loading, unloading and stockyards service in connection with the shipping, receipt and delivery of livestock for the railroads which haul such stock to and from the stockyards."

Now, I take it that you were referring there to the service which the Yards performed in the physical handling of the animals up to the moment when they are lodged in the pens opposite the unloading chutes.

Mr. Gladson: Mr. Examiner, I do not have a copy of the transcript, and I did not catch all of that question; I was wondering if the reporter might read it.

Exam. Carter: The question referred to the last paragraph on page 39. Read the question, Mr. Reporter.

(Question read.)

The Witness: No, it was not confined to that point.

Mr. Smith: Well, I guess we do not understand each other. Of course, you did perform many stockyards services?

The Witness: Yes.

By Mr. Smith:

Q. But your statement here is that, "Its only activity [fol. 517] consists in," and so forth, and I assumed that you meant its only activity in connection with the handling of this livestock, up to the time the live stock was landed in the loading pen.

A. No, I do not think the statement should be interpreted to confine it to any particular starting or stopping point, and especially as your question indicates a point midway in the physical services that we perform. You mentioned the pens——

Q. I wonder if you understood that question. Will you read the question to the witness.

(Question read as follows:

"Q. On page 39 of the transcript, you said, discussing the activity and function of the Yards Company:

" 'Its only activity consists in furnishing a loading, unloading and stockyards service in connection with the shipping, receipt and delivery of livestock for the railroads which haul such stock to and from the stockyards.'

"Now, I take it that you were referring there to the service which the Yards performed in the physical handling of the animals up to the moment when they are lodged in the pens opposite the unloading chutes.")

Mr. Gladson: Do you understand the question, Mr. Henkle?

The Witness: No, I do not think it is wholly clear.

Mr. Gladson: It is not wholly clear to me. I wonder if you do not want to reframe it, Mr. Smith.

[fol. 518] By Mr. Smith:

Q. You testified that in the year 1897 or about that time, the Yards Company ceased itself to handle the cars of livestock over its tracks up to the unloading chutes, is that correct?

A. That is correct. After that time, the railroad service was handled by another company.

Q. And that has been true from that time, approximately 1897 down to date?

A. Yes, sir.

Q. So that throughout those years, the first physical handling that the Yards Company itself has given this livestock has been in the loading and the unloading service?

A. The unloading is the first and the loading is the last.

Q. The unloading is the first physical handling of the livestock by the Stockyards on inbound traffic, is that correct?

A. That is correct.

Q. And that has been so since approximately 1897?

A. Yes, sir.

Q. And since that date, the line haul carriers who bring the live stock in to Chicago and take the live stock out of Chicago have had certain trackage rights under lease from either the Yards Company or some lessee of the Yards Company, which permits those companies so having those trackage rights to handle the live stock as you have indicated?

A. All those trackage rights were between the line haul [fol. 519] carriers and the Chicago Junction Railway Company.

Q. In other words, those trackage rights did not come into existence until the time when the Yards Company had leased these tracks to some other carrier, that follows, I take it, from what you have said?

A. I think that is not the case.

Q. I am just trying to ascertain that.

A. And I do not think I would make any such statement because my impression is that prior to 1897 the line haul carriers themselves brought live stock up to and over the rails that were later on the Chicago Junction rails, and prior to 1897 were operated by the Stock Yards Company.

Q. All right.

A. Does that answer your question?

Q. Well, you did not understand me before, Mr. Henkle, but I think the record is clear on that now.

Now, that 1897 lease was in effect at the time that the Supreme Court decided the Pfaelzer case, was it?

A. It was in effect until December 1, 1913, and I believe that was about the time of the decision in the Pfaelzer case. I do not remember the exact date of the decision.

Exam. Carter: 1912.
The Witness: 1912?
Exam. Carter: Yes.

By Mr. Smith:

Q. Now, under that lease, that is, the original lease, the [fol. 520] Yards Company received two-thirds of the income which was described in that lease, as a consideration for the leasing of the tracks?

A. I don't know all the terms of the lease, but the Yards Company did receive two-thirds of the income, which must have been its compensation for the property which it turned over for operation by the Chicago Junction Railway in 1897 to December 1, 1913.

Mr. Gladson: Of course, Mr. Examiner, the lease is in evidence in this case. If his questions are preliminary to something else, I have no objection.

Exam. Carter: Of course, the terms of the lease as described here by the witness, that is, his description of the terms of the lease, are subordinated to the terms of the lease itself.

Mr. Gladson: That is right.

By Mr. Smith:

Q. Now, subsequent to the decision of the Supreme Court, we have just referred to, a new lease was made, was it not?

A. Yes, sir.

Q. And under that lease the rental of the Yards Company for this property became fixed at $600,000 a year?

A. Yes, sir.

Q. And as I understand your testimony or argument at the initial hearing you relied, in some part at least, on the [fol. 521] change that was made as between the original lease under which the Yards Company received the two-thirds rental, and the computation of which is made on page 144 of that lease, which is an exhibit here, on the one hand; and the different basis of rental that you received under the new lease?

A. I relied on what? I don't understand that question.

Mr. Smith: Read the question.

(Question read.)

The Witness: I don't think the question is clear.

Mr. Gladson: Mr. Examiner, I think after all, that is a question for counsel.

Exam. Carter: He is asking the witness if he relies on that change as justification for the claim that they were no longer a common carrier.

The Witness: He did not say that.

Exam. Carter: Is that not what you said?

Mr. Smith: Yes, that is exactly what I said. If you were familiar with this record, Mr. Gladson, you would recall that this witness testified at great length as to the change in the status of this company as a common carrier, and dwelt upon it at great length, and is it not true that one of the things that you referred to as having occurred since that decision of the Supreme Court, was the change in the rental basis from one under which the Yards Company got two-thirds of the net earnings and revenue of the railroad, [fol. 522] to the fixed $600,000 basis.

Mr. Gladson: Mr. Henkle stated what the facts are, and if he wants to state conclusions as to the legal effect of them I have no objection, but in the ultimate analysis, so far as the legal effect of it is concerned, that is for us lawyers to argue.

Mr. Smith: I thought so at the first hearing, but the Examiner will recall that Mr. Henkle said that the status of the Yards as a common carrier—and he used those words—since the decision of the Supreme Court had not only been changed but revolutionized, and then he undertook to state the basis for that conclusion, and among other things he stated the thing to which I now refer, and call his attention, namely the change in the rental basis.

Mr. Gladson: My recollection is, Mr. Examiner, that that statement about the situation being revolutionized was the change that occurred in 1922.

The Witness: It was.

By Mr. Smith:

Q. Well, you do not contend—may we understand—that there was any change in the status of the Yards Company with respect to whether or not it was a common carrier,

between the time of the decision of the Supreme Court in the Pfaelzer case and the making of the lease now in effect between the Yards Company and the Junction on the one hand, and the New York Central and its subsidiaries on the other hand?

[fol. 523] Mr. Gladson: Mr. Examiner, that is a legal question and I object to it.

Mr. Smith: You have suggested to the witness he was not relying upon facts as to any change between these two leases, but was to rely upon a change that occurred under the decision of the Supreme Court as to the New York Central.

Mr. Gladson: I made no such statement or suggestion.

Mr. Smith: You can argue that in brief if you want to.

Mr. Gladson: I object to the question. It is a conclusion as to whether he stated the fact as to the change that occurred in 1912 or 1913. Now, what is the effect of that, is a question of law.

Exam. Carter: I will overrule the objection and note an exception.

Mr. Fulbright: What was the ruling?

Exam. Carter: Overruled.

The Witness: My recollection is, Mr. Smith, that the word "revolutionized" referred to the period of May 1, 1922 and that lease and not the lease of 1897.

Exam. Carter: Is it your position that this change which has been described, changed the status of the Yards Company as a common carrier?

Mr. Gladson: Mr. Examiner, for the record, I want to say that the position of the Stock Yards Company on legal matters will be stated in its brief and argument to the Commission.

[fol. 524] Exam. Carter: The testimony of witness Henkle both at this hearing and at the previous hearing contains quite a lot of argument, in addition to facts. Inasmuch as he has made his arguments on these phases of the situation, it might be enlightening to hear his own position as to these particular facts. Can you answer that question or not?

The Witness: Mr. Examiner, may I refer to the record and to my statement about revolutionized?

Exam. Carter: Certainly. You remember, however, that my question did not deal with the word "revolutionized". Read the question, Mr. Reporter.

(Question read.)

Exam. Carter: I am referring there to the change from the two-thirds basis to the $600,000 basis.

Mr. Gladson: That was in 1913?

Exam. Carter: Yes, sir, in 1913.

The Witness: I stated in my testimony this morning it has always been my idea we were not a common carrier, and while these various changes through the years may have affected conditions from time to time, we were all of the time of the opinion that we were not a common carrier.

By Mr. Smith:

Q. Now, will you state, please whether the change in the rental basis which you so specifically discussed at the first hearing, is one of the factors you rely on as changing, as you say, the common carrier status of the Yards Company?

[fol. 525] Mr. Gladson: To that question I offer objection.

Exam. Carter: Overruled, and note an exception.

Exam. Carter: Read the question, Mr. Reporter.

(Question read.)

The Witness: I made the statement of the facts as I knew them, about the contract, and I do not think that I, at that time, discussed specifically the effect that they would have as to whether we were a common carrier. It seems to me that that was the legal end of the question, which I have not attempted to discuss.

Exam. Carter: You have not given the page of the record there in which you made that statement?

The Witness: No, I have not.

Exam. Carter: Do you know what page it is on?

The Witness: And you recall that I referred to the change in 1922——

Mr. Smith: These questions are preliminary to some other questions. Whatever you said before, will you say now as a witness here, whether the change in the rental basis is one of the things that you rely upon in your position now that the Yards Company is not a common carrier?

Mr. Gladson: May it be understood that we object to this too?

Exam. Carter: Yes.

You said on page 16 of the record, referring to 1922 that,

[fol. 526] "In that year the status of the Yards Company with respect to its alleged carrier activities was not only completely changed, it was revolutionized,"

and then you described the lease in 1922.

The Witness: In 1922, the Chicago——

Exam. Carter: What did you mean when you said "the status of the Yards Company with respect to its alleged carrier activities, was not only completely changed, it was revolutionized?

A. I meant at that time and under the lease, the Chicago Junction Railway itself, which had been operating the roads, passed out of existence and the control—or the operation of the roads from that point on was not under either the Junction or the Stock Yards.

Exam. Carter: Did the Chicago Junction Railway pass out of existence?

The Witness: It now exists only as a holding company and is not an operating company in any way. That was the point that I meant to make.

By Mr. Smith:

Q. Now, Mr. Henkle, starting with the answer counsel has given to the question that the Yards will place reliance upon this change in the rental basis, I will ask you to state what the Yards Company received as its annual rental on that basis for each year from the date of the execution of that lease up to the time when the new lease was made putting [fol. 527] the Yards on a $600,000 a year basis?

A. Until the latter part of 1897, the Stock Yards Company received two-thirds of the revenue from the operation of the roads.

Q. That is up to 1897?

A. Yes, sir, and from 1897 to 1913——

Q. Now, let us get it up to 1897. Who operated the Yards facilities prior to that date. You say the Yards got a certain rental,—from whom?

A. Now, wait a minute. I am confused. It was between 1897 and 1913 that the two-thirds rental applied. Prior to that time the entire operation of the road and the Stock Yards was carried on by the Stock Yards Company. I believe the record clearly shows that.

Q. All right. Now, if you will answer the question.

A. May I have the question again.

Q. Read the question.

(Question read.)

A. That is from the date of the 1897 lease up to the date of the execution of the 1913 lease?

A. That was the period during which the Stock Yards Company received two-thirds of the revenue for the operation of the roads.

Q. And what did that two-thirds amount to for each year?

A. I don't know.

[fol. 528] Q. Referring you to the Commission's valuation report on the New York Central Railroad and directing your attention to page 728 of that report, I will ask you if, refreshing your recollection from that statement, you can answer questions——

Mr. Hamilton: Would you give the volume reference for the record, Mr. Smith?

Mr. Smith: The report I refer to is Volume 128 I. C. C. Valuation Reports, and the tabulation which I refer to is on page 728 of that report.

The Witness: How far does this go?

Mr. Smith: I am only directing your attention to the tabulation I have referred to on page 728 which is captioned by the Commission: "Income statement of the Chicago Junction Railway, and condensed summary of the income accounts for the year ended December 31, 1917, and for the period from April, 1898, date of valuation, (the data for the period prior to 1906 being taken from reports of this Commission) as follows:"

The Witness: And the question again, please.

By Mr. Smith:

Q. What that rental was, received by the Yards Company for those years?

A. It would take me sometime to study that statement, I should say, before I could give you an intelligent answer. I do not think that that is set forth definitely.

Q. I call your attention to the item, "Rent for leased rights under the heading 'Deductions from Gross Income' ", [fol. 529] and to the fact that it is slightly over $11,000,000 for the years shown. Is that of any service to you in answering that question?

A. No, sir, I have no idea what the $11,000,000 refers to.

Q. What other lines did the Junction lease during those years in addition to the lines which it leased from the Yards Company?

A. I would have to refer to the records. There might have been one other project but I could not give any definite statement about it without going to the records.

Q. You were with the Yards Company during those years, were you not?

A. During what years?

Q. From 1897 to 1913?

A. I was with the Yards Company from 1903 to 1913.

Mr. Smith: Now, Mr. Examiner, inasmuch as this change in rental basis is one of the things upon which counsel says the Yards relied to show a change in its common carrier status, we ask that the Yards be required to furnish a statement of the amount of rental which it received from the companies to which it leased its lines between 1897 and the making of the new lease in 1913, for each year during that period.

Mr. Gladson: Mr. Examiner, the statement of counsel was that we relied in part on this change in the rental basis. There was no statement that we relied in any way upon the change in the amount of the rental.

[fol. 530] Mr. Smith: I want the record to show what the facts are about that.

Mr. Gladson: Not only that but the Supreme Court prior to that had already decided the question.

Exam. Carter: And will you furnish that information?

Mr. Gladson: If the Examiner requests it, yes, I will, and if it is available.

Exam. Carter: Can you furnish that during the course of this hearing?

The Witness: You cannot find it in our office.

Exam. Carter: You cannot find it there?

Mr. Smith: That is, you mean, you cannot find from the books of the yards company, how much the Yards Company received as rental for the lease of its lines, for the years 1897 to 1913? Have the records been destroyed prior to 1913?

The Witness: Practically all of our records were destroyed in the fire of 1934.

By Mr. Smith:

Q. Well, were your corporate books, showing your income, destroyed?

A. I do not think there are any corporate books destroyed. There were some destroyed in the fire of 1905, and I do not think there are any corporate books in existence that shows that information.

Q. What books did you turn over to the Secretary of Agriculture as a basis for his check, in the rate case that has [fol. 531] been in progress for some months or years before the Secretary of Agriculture?

Q. He had access to all of our books, and there is much information in the record that was not obtained from our books.

Mr. Gladson: Well, in any event, Mr. Examiner, we have promised to ascertain during the lunch hour whether we have got that information.

Exam. Carter: Have the books of the Chicago Junction Railway been destroyed by fire also?

The Witness: All of the records of the Junction and the Stock Yards except a few of the books without any supporting details, were destroyed in that fire.

By Mr. Smith:

Q. I thought at first you were referring to a previous fire you had there. When did that previous fire occur that destroyed certain records?

A. 1905, and there were a great many Chicago Junction records that were destroyed in that fire.

Exam. Carter: Will you let us know what the situation is during the course of the hearing?

Mr. Gladson: Yes.

By Mr. Smith:

Q. Where did the Junction Railroad keep its records?

A. Up to—well, the auditing records of the Chicago Junction Railway were kept by the auditor whose office was in the old Exchange building, and later in the new Exchange [fol. 532] Building at the Stock Yards. Of course, there were many other records other than the auditing records which were kept in some of the operating offices.

Q. At the previous hearing you gave the name of the holding company which, throughout the years we discussed, has owned stock of the Union Stock Yards & Transit Company. What was the name of that company?

A. The Chicago Junction Railway and Union Stock Yards Company.

Q. And that, I think you said, is a New Jersey corporation?

A. Yes, sir.

Q. Where does it have its principal office?

A. In New Jersey.

Q. And its records are kept there?

A. I do not know what records are kept there. I am not connected with that company.

Mr. Smith: Amplifying my request—or not amplifying the request in any respect, but with reference to the matter of complying with that request, I shall ask Mr. Gladson that if you fail to find this information in the records of the Union Stock Yard and Transit Company, you furnish the information obtained either from the records of the Junction Company or the records of the holding company, the New Jersey Company.

Mr. Gladson: I have no control of and do not represent the Jersey Company, Mr. Smith. I suggest there may be some information on that score in the files of the Commis-[fol. 533] sion in the annual reports, and certainly if we don't have the information it would be just as easy for you to go to the Commission's files as it would be for me to try to get it from the Jersey Company, which I do not represent.

Mr. Smith: We will see how successful your quest is.

By Mr. Smith:

Q. At the previous hearing you testified, as I understood you—correct me if I am wrong—that one of the bases for the Supreme Court decision which was no longer existent in point of fact, was an intercorporate relationship through the medium of a holding company with the Junction, which was operating a railroad, is that correct?

A. Yes, sir.

Q. And the point you made was, as I understood it, the Supreme Court relied upon the fact that the stock of the Union Stock Yards and the stock of the Junction was held by this New Jersey holding company, and that since that date the Junction had made certain changes with reference to the operation of the property?

A. There was a general statement made, as I recall it, that the Supreme Court thought that there was a close

relation between the Stock Yards Company and the Chicago Junction Railway Company through the holding company with an operating railroad, and for that reason they thought we were both common carriers.

Q. Am I correct in my understanding that at that time the Yards Company did not own any stock of the Chicago Junc-
[fol. 534] tion Railway nor did the Junction Company own any stock of the Yards Company?

A. At which time, Mr. Smith?

Q. At the time of the Supreme Court's decision?

A. So far as I know neither company ever owned any stock of the other company?

Q. The relationship was through the medium of a person or corporation which had a common stock interest in each of those two companies?

A. Yes, sir.

Q. Looking a little further into that asserted change in status, is there any person or corporation which now has an interest in the Union Stock Yards, which also owns an interest in any operating railroad?

A. I do not know what interest in any operating railroads might be held by the holders of the stock of the Stock Yards Company, if that is what you mean.

Q. That is exactly what I mean. So you do not know whether, in point of fact, there has been a change in that regard or not, then, do you?

A. The change I referred to and discussed was our divorce from an operating railroad, and from that point on our connection with the Chicago Junction Railway, which was not with an operating railroad but with a non-operating railroad.

Q. Are you able to say whether anyone owns directly or
[fol. 535] indirectly a substantial interest in the Stock Yards Company and also in 1912 owned some interest in an operating company?

Mr. Gladson: Did you understand the question?

A. I think I replied that I did not know what interest the holders of the stock of the Stock Yards Company might have in various railroads.

Q. So you do not know whether there has been a change in that regard or not, do you?

A. Yes, I do, I stated that the change was that it was in fact associated with a single holding company, holding the stock of both concerns, one of which was an operating rail-

road, and since that time it was not an operating railroad, and confining that statement to our connections, that the Stock Yards Company is not associated with any operating railroad as it was before that time.

Q. All right, what are the assets of this New Jersey holding company at this time?

A. I have no idea. I am not connected with that company.

Q. So, as far as you know, it may own a substantial interest in other operating companies, just as in 1912 it owned an interest in the Junction?

A. I have no idea—I have no knowledge of what it may have owned, either at that time or since.

Q. Who owns the New Jersey Company?

A. I do not know.

Q. Didn't you testify you did know, in docket 4109?

[fol. 536] A. No, sir.

Q. Didn't you testify in that case that Mr. F. H. Prince owned the Jersey Company?

A. I may have stated that Mr. Prince himself had stated he owned it. I don't know who owns it.

Q. What was the basis for the statement you made in Docket 4109 in that connection?

Mr. Gladson: Just a moment, it does not show in this record whether he made it.

Mr. Smith: I am asking him whether he did or did not, did you or did you not?

The Witness: It is not my recollection that I said I knew who owned the Jersey Company, no, sir.

By Mr. Smith:

Q. Now you state you do not?

A. I don't now.

Mr. Smith: Mr. Examiner, inasmuch as the Yards Company relies among other things on the fact there has been a change in regard to what we have been discussing, we ask that the Yards Company be required to show who has the ultimate ownership in the Union Stock Yard and Transit Company of Chicago and the Chicago Junction Railway, in the New Jersey Company which holds all or part of the securities of those two companies; and we ask that in addition to that in view of the contention made here by the respondents, that it also be shown what, if any interest the owners of the companies, to which I have referred have,

[fol. 537] whether they be natural or artificial persons, in any railroads operating in the United States.

Mr. Gladson: Mr. Examiner, in the first place, much of that information which is requested is immaterial. As to the rest of it, I do not know whether we have the information or not. If we have not got it, why, we cannot furnish it. That is a thing I will have to inquire into during the noon hour. We are not connected with the Jersey Company and we are not connected with any owner of the Jersey Company.

Exam. Carter: You will let us know your answer to that request after the noon hour?

Mr. Galdson: Yes, if I can find that out during the noon hour, I will give you an answer.

By Mr. Smith:

Q. On page 34 of the transcript you stated that the Yards invited each of the Chicago lines to enter into a joint rate. Do you find that place?

A. Yes, sir.

Q. Will you state just what that invitation consisted of, please?

A. Well, my understanding is that the offer was made to all the railroads entering Chicago; the same offer that was made to the Chicago Great Western.

Q. That is, that a joint rate be established and that out of that joint rate as a division, the Yards Company should take its present loading and unloading charge, plus $3?

[fol. 538] A. I think that was the effect of it, yes, sir.

Q. And who extended that invitation?

A. Mr. Richard O'Hara had charge of that.

Q. Did you participate in it?

A. I believe only in one general meeting.

Exam. Carter: Who is Mr. Richard O'Hara?

The Witness: He is a traffic and rate expert.

Exam. Carter: Is that his only occupation?

The Witness: No, he is president of the International Railweld Corporation.

Exam. Carter: Is he a representative of Mr. Prince?

The Witness: He so stated to the Railroad Committee, at the only time I was present.

Exam. Carter: When this proposition of the division was advanced, is that what you mean?

The Witness: That was——

Exam. Carter: Now, let me get this straight. You say that Mr. O'Hara was the representative of Mr. Prince at the meeting at which this divisional arrangement was proposed to the carriers, by which they would pay $3 more for the loading and unloading service than they then paid, is that correct?

The Witness: That is my recollection, that that happened at that meeting.

Mr. Gladson: Will the reporter read that question and answer. I am not sure Mr. Henkle understood it correctly.

[fol. 539] (Question and answer read.)

The Witness: The specific items for which the $3 was to be collected were stated in the tariff, and my statement was that Mr. O'Hara himself said that he was the representative of Mr. Prince.

Exam. Carter: You were present at that meeting?

The Witness: I was present at that meeting but took no part in it.

Exam. Carter: And at that meeting that proposition was made by Mr. O'Hara to the representatives of the railroads present?

The Witness: I am referring now to a meeting held in Mr. Sperry's, I believe, office, Chicago office——

Exam. Carter: Is it your understanding that this proposition originated with the Union Stock Yard and Transit Company?

The Witness: Yes.

Mr. Gladson: Mr. Henkle, you said that the $3 referred to the items in the tariff. To what tariff did you refer?

The Witness: The tariff I have in mind as giving the statement is the P. & S. tariff which describes what the $3 was for.

Exam. Carter: What is this P. & S. tariff?

The Witness: That is a tariff which the Stock Yards Company filed with the Packers and Stock Yards Adminis-
[fol. 540] tration of the Department of Agriculture.

Mr. Gladson: And it is exhibit 8.

Exam. Carter: Yes, I recall it.

Mr. Walter: That was not limited, was it, to the mere loading and unloading?

The Witness: If you will read the tariff it is——

Mr. Walter: I think it is important, since I. & S. Docket 4244 is being held awaiting the decision in this case, that

we make it clear what that $3 additional was, whether it was merely the loading and unloading or other services. That is the point I want the record to be mighty clear on.

The Witness: It was for other services than what had been previously known as the loading and unloading services and it so states in this tariff. This tariff describes what the $3 is for.

Mr. Gladson: That is exhibit 8?

The Witness: Yes, sir.

Mr. Walter: Then, you don't need that. The Examiner's question was merely the loading and unloading charge, and I want to make it clear so far as we are concerned that it was for all of the services in connection with the rate.

Exam. Carter: Let us just get that clear in the record right at this point. This meeting at which the proposal was made, as you say, by Mr. O'Hara to the carriers, did the original meeting take place prior to or subsequent to [fol. 541] the filing of this tariff you have just referred to?

The Witness: I have not before me the first tariff in which this was filed, and I could not answer that without reference to the records.

Exam. Carter: Did you not testify in I. & S. 4109 that the first meeting of the carriers was prior to the filing of that tariff?

The Witness: If I did, I was correct then.

Exam. Carter: Will you check up on that and let us know at a later time?

The Witness: Yes, sir, I will.

By Mr. Smith:

Q. Mr. Henkle, isn't this the sequence of those events, that your first move in connection with obtaining this additional $3 was to approach the carriers and ask them to sign a contract, the contract to which you have referred, I think in your previous testimony covering this $3 charge?

The Witness: That is a conclusion that those contracts were ever given effect.

By Mr. Smith:

Q. Do you have with you a copy of that contract that was presented to the Chicago lines with the request that they sign it?

A. I have not.

Mr. Smith: I ask that you produce that contract for the record as an exhibit.

Mr. Gladson: I object to that. It is the tariff that is in [fol. 542] issue in this case.

Mr. Smith: I think I am correct in saying that the witness referred to that $3 contract at the previous hearing.

Mr. Gladson: Even if he did, he has not referred to it in this hearing.

Mr. Smith: I mean the previous hearing in this case.

The Witness: I did not refer to it. You asked a question about it.

Mr. Smith: Well, in any event we think it is material, Mr. Examiner, and we ask that it be made a part of this record.

Exam. Carter: Will you furnish copies of the contract?

Mr. Gladson: We will if the Examiner requires us to do so.

Exam. Carter: I so rule, and note an exception.

By Mr. Smith:

Q. Mr. Henkle, isn't it the fact, rather than the way you stated it, that at the meeting to which you have referred, the proposal that was made to the carriers was not that they join in a joint through rate as the Great Western later undertook to do, but that they sign this contract agreeing to pay the additional $3 to the Yards Company?

A. I am unable to definitely answer that question because as I have stated before, I did not have charge of the details of that transaction. I stated that I was present but I took no part in the discussions in any way.

[fol. 543] Q. Well, in any event you have testified here and you testified before the Secretary of Agriculture, did you not, that the $3 item which was to be covered by this contract was to cover the services that are referred to in the tariffs which you have on file with the Secretary of Agriculture?

A. That is my recollection of it, yes, sir.

Q. And you do have under suspension a joint through rate with the Great Western in which, in the form of a division, you would take $3 in addition to your present loading and unloading charge?

A. That is correct.

Q. Now, in your testimony before the Secretary of Agriculture, I will ask if you were not asked this question by Mr. Gladson and did not make this reply:

"Mr. Gladson:

"Q. (Mr. Gladson)"—I might say to refresh your recollection that this is evidence you had testified, and Mr. Gladson was going over with you certain of your answers——

"Mr. Gladson: One reading the record might get the impression that you assumed that the $3 charge against the railroads on those inbound and outbound shipments either was being collected or would be collected. Did you intend to give any such impression?

"Mr. Henkle: No. My recollection is that I testified that we have been and are attempting by every means we know to collect this item and that we have not done so."

[fol. 544] Is that a correct statement of your answer?

The Witness: Yes, sir.

By Mr. Smith:

Q. And is it correct?

A. Yes, sir.

Q. And on page 4240 of that record you said, did you not:

"We are using our best endeavor to collect it"—(the $3 item)—"in some one place?"

A. No doubt that is what I said but what I intended to convey was we only attempted to collect it from one spot. If we got it there we would cease trying to collect it in other directions.

Exam. Carter: What did you mean by "from one spot"? What did you mean by that?

The Witness: Well, I might say by one method, if under the tariff of the Secretary of Agriculture we were able to collect it there, we would not expect to collect it from any other source.

By Mr. Smith:

Q. That is, you meant that on each inbound and outbound car you wanted to collect an additional $3, but at this time at least, you were not asking that you collect that $3 with reference to each inbound and outbound car and then some other $3 item in addition to that?

Mr. Walter: On the same car.

By Mr. Smith:

Q. On the same car?

A. That is what I intended to convey, yes, sir.

[fol. 545] Q. And when you said that you were "attempting by every means we know to collect this item", I assume that you referred to the contracts which you requested the carriers to sign covering the $3, and to the effort to get it as a division in a joint through rate with the Great Western, and by filing a tariff with the Secretary of Agriculture covering the item, you referred among other efforts, to this contract?

A. Yes, sir.

Q. And when you said in this case in which you attempted to cancel your tariff on file with the Commission, that you had invited all these other lines to pay this additional $3, what is the relevancy of that statement to this proceeding?

Mr. Gladson: Just a minute. He did not make that statement in the first place.

Mr. Smith: Didn't he?

Mr. Gladson: The statement was that "At the same time, it invited every other railroad company entering the City of Chicago to enter into a like joint rate."

Mr. Smith: What is the page that that is on?

Mr. Gladson: Page 34.

Mr. Smith: All right.

By Mr. Smith:

Q. Now, what is the relevancy of that dissertation to the proposal that you be permitted to cancel your tariffs with the Interstate Commerce Commission?

Mr. Gladson: I will elaborate on that, Mr. Examiner, if [fol. 546] I may. It seems to me that that is in my alley.

Mr. Smith: I am asking the witness.

Mr. Gladson: I am objecting to your asking the witness.

Mr. Smith: The witness ought to be able to state what the relevancy is of the matters which he testified to unless there is specific objection.

Mr. Gladson: Mr. Examiner——

Exam. Carter: I sustain the objection.

By Mr. Smith:

Q. Is it not a fact that the logic of your reference to that was that this attempt to cancel your tariffs with the

Commission is just another means to the end of collecting the $3?

Mr. Gladson: I object to that, Mr. Examiner.

Mr. Smith: That is a perfectly proper question I submit.

Mr. Gladson: It is not. He made a statement of fact. Now, that inquiry hasn't anything to do with it.

Exam. Carter: Has it been the purpose of the Stock Yards Company since sometime prior to the date on which it filed these tariffs in Docket 4109 to increase its charges for this particular service $3 per car? Has not that been the purpose, or one of the purposes at least of the Stock Yards Company in the various matters that it has undertaken to accomplish, that is, by the contracts, and by joint arrangements with the Stock Yards Company, and by filing the tariff with the Secretary of Agriculture and by the withdrawal of the tariffs from the files of the Commis-[fol. 547] sion?

The Witness: I think that is a correct interpretation of our endeavor.

Exam. Carter: Did you ever give consideration, Mr. Henkle to attempting to justify an increase in the charge, of $3 per car, before the Commission?

The Witness: No, sir, not before the Commission.

Exam. Carter: I know you never attempted to justify it before the Commission, but I mean, have you given consideration to making an effort to justify an increase of $3 before the Commission? In other words, in the previous proceeding when you wanted to increase the charge from 50 cents to 75 cents and from 75 cents to $1.25 and so forth, you brought proceedings before the Commission to accomplish that, did you not?

The Witness: Yes, sir.

Exam. Carter: And that went along for a number of years, did it not?

The Witness: Yes, sir.

Exam. Carter: Now, this may not be relevant either to the issues, but why is it you did not continue with that procedure?

The Witness: Well, the various plans that we have undertaken and developed in connection with getting increased rates have been the subject of discussion with our attorneys and they have been the ones that have finally decided

[fol. 548] in which direction we should endeavor to secure increased revenue.

Exam. Carter: Pardon the interruption.

By Mr. Smith:

Q. You are the vice-president and general manager of the Yards Company, are you not?

A. Yes, sir.

Q. Haven't you pursued the course which you have, and which we have been discussing, because you felt you had gone as far as you could before the the Interstate Commerce Commission in the direction of increasing your charges?

Mr. Gladson: Oh, I object to that. The witness has said that his efforts to get increased charges followed the advice of his counsel. Now, there have been a lot of references made and intimations in this case that there is something wrong with that $3 charge——

Exam. Carter: I sustain the objection.

Mr. Gladson: I just want to say that the $3 charge and the way to collect the $3 is nothing to be ashamed of, and we have no apologies to offer in this record on that $3 charge, and when I make that statement I make it advisedly, because I have been for the last six months engaged in a proceeding before the Secretary of Agriculture in which we went into costs and valuations at great length, and I state on the record that we have no apologies with regard to the $3 charge, and besides that, these references to the $3 had nothing to do and have nothing to do with whether the Stock Yards Company is a common carrier or is not a common carrier.

[fol. 549] Mr. Smith: That perhaps answers my question as to the relevancy of that statement that the witness made on direct?

Mr. Gladson: It does not, but as to the quantum of the $3.00 charge, the additional charge, that has nothing to do with this proceeding. We have that $3.00 charge there, of course, but it has nothing to do with the merits or the question of law which the Commission has before it in this proceeding.

By Mr. Smith:

Q. In your testimony in Docket 4109 you said that if the Yards Company was permitted to withdraw these tar-

iffs on file with the Commission, that the determination of the amount to be paid by the carriers for the loading and unloading service would be a matter of barter and trade between the Yards and the yards railroads. Is that still your position?

A. I said it at that time, but in the development of our plans it may well be that the charges will all be subject to the Secretary of Agriculture and will be arrived at by or with his approval.

Q. What are those plans that will produce that result which you mention, or to which you refer?

A. It would be very difficult to state what all those plans are.

Q. Well, just in brief an outline.

Mr. Gladson: Mr. Examiner— —

Exam. Carter: Just a minute. I believe Mr. Henkle some- [fol. 550] what described the plans.

Read the previous question, Mr. Reporter.

(The question was read.)

The Witness: And what did I say? Read the answer.

(The answer was read.)

The Witness: The thought I had in mind in speaking of plans was that the entire procedure which we have been carrying on for many months has been to find a solution or a plan by which we can secure from some source and from some authority increased revenue. Those plans change from day to day, from decision to decision.

By Mr. Smith:

Q. You have made the statement today, and if they change as quickly as that you, you might state what they are today, as the basis for that statement.

A. I will have to consult my attorneys and all my associates to make a definite statement of what our plans are.

Q. No, just state what the plans are that you had reference to.

Exam. Carter: You said you had plans to make the jurisdiction of the Secretary of Agriculture inclusive over all these services. Now, what did you have in mind?

The Witness: I think I said it might develop that he would have.

Exam. Carter: Yes, but what did you have in mind?

The Witness: That the measurement of our charges at present are subject to the approval and under the regula- [fol. 551] tion of the Secretary of Agriculture. The only charge that we have other than that, that is not under his regulation and authority, is the loading and unloading charge, which is a small part of our revenue.

Exam. Carter: Are you——

Mr. Gladson: Mr. Henkle——

Exam. Carter: Now, just a moment. Are you approving some of the plans that you said you had for placing that particular activity which is now subject to the Interstate Commerce Act under the jurisdiction of the Secretary of Agriculture?

The Witness: Well, yes.

Exam. Carter: Will you explain that?

The Witness: I do not think it is up to me to explain that further; all I could intelligently explain is that the plans are all being developed by our attorneys.

Exam. Carter: When you say plans, do you have in mind any legislation that has been introduced this summer?

The Witness: No, sir.

Exam. Carter: You have not?

The Witness: No, sir.

Mr. Gladson: I object to the question of the Examiner, getting into legislation.

Exam. Carter: Your objection is overruled.

Mr. Gladson: I preserve an exception.

Exam. Carter: Exception noted.

[fol. 552] Mr. Gladson: It throws no light on this case whether there is legislation or whether there is not legislation.

Exam. Carter: Can you answer my question, or can't you?

The Witness: I cannot.

By Mr. Smith:

Q. I believe at the previous hearing you stated that you either thought this service ought to be subject to the jurisdiction of the Secretary, or that you preferred it to be subject to the jurisdiction of the Secretary of Agriculture. What is your view on that?

A. Well, both that it ought to be and that I would prefer it to be under the Secretary of Agriculture.

Q. Why, with reference to your preference in the matter?

A. Well, because of the fact, as I say, that the Secretary of Agriculture has very close and thorough contact with all of our operations, and he covers practically everything we do now.

Q. Covers it in what way?

A. By regulating our charges.

Q. Does he regulate your charges?

A. Yes, sir.

Q. Does he regulate all your charges?

A. Yes, sir, all of them.

Q. In connection with the testimony of this witness, and referring to the statement of your counsel, Mr. Gladson, in the cross examination of one of the witnesses for the Secretary of Agriculture in Docket No. 472, I will ask you [fol. 553] whether you agree or disagree with the statement of your counsel at that time, that since 1921 the Secretary has not fixed the rates of the Stock Yards Company, and his statement that "So the success of the company has been from its inception without any practical regulation by the Secretary; perhaps I should say practically no regulation by the Secretary"?

Now, do you agree with that statement?

Mr. Gladson: Now, just a minute. You are assuming there has been such a statement?

Mr. Smith: Do you deny it?

Mr. Gladson: I am not called upon to deny it or do otherwise.

Mr. Smith: Are you objecting to this question? Is that the point of your comment?

Mr. Gladson: Yes, I am objecting to it.

Mr. Smith: All right, we submit that to the Examiner.

Mr. Gladson: I am also objecting to the assumption you have made that such statements were made.

Exam. Carter: Read the question, Mr. Reporter.

(The question was read.)

Exam. Carter: I think you might modify that question by referring to statements as questions, because they are questions.

Mr. Smith: Yes, that is true.

Mr. Gladson: Mr. Examiner, I want to be heard on that.

Exam. Carter: You will be heard at the proper time, and I

[fol. 554] do not want you to be pointing your finger at the Examiner.

Mr. Gladson: Mr. Examiner, I will conduct my side of the case——

Exam. Carter: You will conduct it according to the rules of the Commission, sir. I have not ruled on that. I have asked Mr. Smith if he will modify his questions to substitute the word "questions" for "statements", because, as I understand it, from this exhibit, he made reference to certain statements and they are questions.

Now, you may make your objection.

Mr. Gladson: My objection is that in that case I am before the Secretary of Agriculture, I am talking as counsel, I have the right to ask any questions that I please in that particular case, and it is wholly improper to refer to them as statements made by me, and if they are now referred to as questions, it seems to me it is wholly improper to try to bind this witness by what his counsel may have asked in some other case or cases. Mr. Smith has indicated that the witness of whom the question was asked was a government witness on cross-examination.

Mr. Smith: Does that complete your statement?

Mr. Gladson: That completes my statement. I have an objection to it.

Exam. Carter: Mr. Gladson, as I understood the question which Mr. Smith asked this witness, it was if he agreed with [fol. 555] the substance of those questions, is that not what you asked him?

Mr. Smith: Yes. I used the word "statements", and at the suggestion of the Examiner, which I think is an appropriate one, I should have said "if he approved the position that is implied in the questions your counsel asked"——

Mr. Gladson: Now, just a moment.

Mr. Smith: I want to discuss this with you, Mr. Gladson, a little, first. Mr. Gladson, we have had some discussion here outside of the record—off the record—with regard to certain items of proof, and I would be glad to have you tell me at this moment why you want to urge that objection to this, except it has not been shown to be a correct excerpt of this record.

Mr. Walter: May I say——

Mr. Smith: Now, let me get that answer.

Mr. Gladson: Let me answer Mr. Smith.

Mr. Smith: You can take as long as you like.

Mr. Gladson: I take it to be pages of the transcript before the Secretary of Agriculture. I do not at the moment remember each particular question, but I will be glad to check against the record in that case, and if this is correct, and correctly states the questions I asked in that case, I will not make any point of authenticity.

Mr. Smith: Thank you.

Exam. Carter: Now, will you suspend then your examina-
[fol. 556] tion on this point until Mr. Gladson has made this check?

Mr. Gladson: Now, I do say this——

Exam. Carter: If you do that you can save your objection until later.

Mr. Smith: Mr. Examiner, I will be glad to do that. I will state now that if Mr. Gladson comes back and tells me it is incorrect, within a reasonable time, I will change it, and I simply want an answer as to my side of the question, and the question now before the witness, as to whether he agrees or disagrees with the sentences which are employed in the questions of his counsel, which I take it were made in good faith of the witness he was interrogating.

Mr. Walter: May I interrupt to see if I cannot clarify this? Is not what you want is to ask this witness the question asked of that witness? If that is so, why not ask the questions of this witness and get his answers?

Mr. Gladson: I object to the materiality of the question, and I also object to the indefiniteness of the question, whether the witness states that the substance of my questions are correct. I think we ought to have a specific question.

Mr. Smith: Well, I will ask another question.

By Mr. Smith:

Q. You have said that you were subject to and have been subjected to the regulation of the Secretary of Agriculture. I will ask you if you agree or disagree with the inferences in the questions which your counsel put to witness Dozier, [fol. 557] which are transcribed on Exhibit No. 21, to the effect that "since 1921 the Secretary has not fixed the rates of the Stock Yard Company, and that the success of the company has been from its inception without any practical regulation by the Secretary; perhaps, I should say practically no regulation by the Secretary?"

Mr. Gladson: That is a double-barreled question. I think he should have one question at a time.

Exam. Carter: Why can't you just ask him what the fact is, and not whether he agrees or does not agree with any inference; just ask him the question what is the fact about it.

Do you agree with this question that was asked, or do you agree with this which was about the substance in my opinion of the question asked "Since 1921 the Secretary has not fixed the rates of the Stock Yards Company"?

The Witness: Reading that question alone it seems to me that I might make it sound very differently. If I was asked that question and I had to dig back and say since 1921 the Secretary has not fixed the rates of the Stock Yard Company, because that would not be what he intended.

Exam. Carter: I am asking you, in the words that I have expressed.

The Witness: The question would indicate that counsel was stating that since 1921 the Secretary has not fixed the rates of the Stock Yard Company. I think the counsel him-[fol. 558] self will admit that is not the intention of the question, because since 1921 the Secretary has fixed the rates of the Stock Yard Company. It seems to me that is clear.

Exam. Carter: Do you mean some of the rates, not all of them?

The Witness: All of our rates with the exception of the loading and unloading charge.

By Mr. Smith:

Q. All right, what rates has the Secretary fixed?

A. The Secretary since 1921 has fixed the rates and charges of the yards company with the exception of the loading and unloading which is collected for under the tariff of the I. C. C.

Q. Does the Secretary know that he has done that?

A. I hope he does.

Q. Under what order did he do that?

A. Under the Act itself we were required to file, I believe, within thirty days the rates and charges which we proposed to assess for all our various services. The Secretary of Agriculture approved the charges, and we collected them in accordance with the schedules approved by him. These schedules were changed from time to time, but at all times the charges since 1921 have been approved by the Secretary of Agriculture.

Q. I ask you to file in connection with your statement a certified copy of the order of the Secretary of Agriculture to which you refer, in which he approved all of these charges [fol. 559] which you say you filed with him.

Mr. Gladson: I think there is some misunderstanding about the meaning of that word fixed. As I understand the facts, if you will accept my statement on this, there has been only one order of the Secretary of Agriculture with respect to our rates. The rates have been fixed or established through the medium of filing tariffs rather than by order of the Secretary.

By Mr. Smith:

Q. Mr. Witness, does the filing of a tariff with the Secretary of Agriculture, so far as the rates which it embodies, have any different significance than the filing of rates with the Interstate Commerce Commission?

A. I think it is practically the same.

Mr. Walter: Let me ask, does not the Secretary write a letter within ten days after the tariff is filed, either approving or disapproving it? Perhaps the witness can tell us that.

The Witness: That is right.

Exam. Carter: What kind of a letter does he write?

The Witness: He writes a letter and says that "Your proposed tariff to become effective on such and such a date has been received for filing", I think are the words he uses.

Exam. Carter: That is in effect an approval of the form of tariff; it is not an approval of your rates, is it?

The Witness: Yes, it is an approval of the rates and the [fol. 560] form.

Mr. Smith: There seems to be a disagreement between witness and his counsel on that score.

Mr. Gladson: Let us develop the facts on the record and leave it to us to argue it.

Exam. Carter: We will recess at this time until 2 o'clock.

(Whereupon, at 12:30 P. M. adjourned until 2 P. M.)

Afternoon session. 2 P. M.

Exam. Carter: All right, Mr. Henkle, you may resume the stand.

O. T. Henkle, heretofore sworn, resumed the stand and testified further as follows:

Cross-examination (continued):

Mr. Gladson: Mr. Examiner, during the lunch hour Mr. Henkle has been in communication with his auditing department and has found that some of the records which show the amount paid by the Chicago Junction to the Stock Yards during the period when the rental was on a profit basis, are available. I think from July, 1906, up until the time the new lease in 1913 became effective.

Those records have not yet been sent down, but before the case is closed we will probably have that information available.

It is also our information that in the government audit Exhibit 26, introduced in the P. & S. case, valuation proceed-
[fol. 561] ing before the Secretary of Agriculture, the government auditor may have included earnings during that period which were paid to the Stock Yards Company. We are not sure about that, but we are trying to get a copy of that exhibit.

We are also taking steps to get copies of the form of contracts that were referred to this morning. We have not as yet been able to develop any information about the holdings of the New Jersey Company, but we may have some information about that tomorrow morning.

Exam. Carter: I think that covered what you requested, did it not, Mr. Smith?

Mr. Smith: I believe the replies have not been produced in Docket 4244 that Mr. Walter agreed to supply.

Mr. Walter: Did I hear my name mentioned?

Mr. Smith: Yes.

Mr. Walter: You want the replies?

Mr. Smith: Yes.

Mr. Walter: Here they are.

(Documents referred to passed to Mr. Smith.)

Exam. Carter: Before we mark this, I assume, Mr. Smith, that you want to prove this quotation from the testimony which has been offered as Exhibit No. 21. You have not actually identified it.

Mr. Smith. No, I have not. Mr. Gladson was going to check it during the noon hour, and I want to take that up
[fol. 562] with him immediately.

Exam. Carter: Have you had that checked from the records, Mr. Gladson?

Mr. Gladson: Our copy of the record is down at Washington, where Mr. Tyler is abstracting the record, but if Mr. Smith says he got it out of the transcript I am willing to take his word that that is what I said.

Mr. Smith: I have the official transcript here, and if you like, Mr. Gladson, you can have one of your associates make a check of it now.

Mr. Gladson: I am willing to take your word for it, if you have checked it personally.

Mr. Smith: I have not checked it myself personally. I asked my secretary to check it, and I am satisfied this is a true excerpt from the record.

Mr. Gladson: I am willing to take Mr. Smith's word and the word of his secretary that that was what was said at that time.

Exam. Carter: That will be marked as Exhibit No. 21. Did you make an objection to its materiality?

Mr. Gladson: I did not understand it was to be marked as an exhibit. I objected to questions put to Mr. Henkle in regard to which——

Mr. Smith: I offer it as an exhibit.

Mr. Gladson: All right. I object to it as not competent [fol. 563] in any way. I have never known of any procedure where the questions of an attorney on cross examination were ever put in as proving any facts. It is so foreign to anything that I have ever heard of that I cannot conceive of its being of any evidentiary value.

I have the further objection that apart from the context of the other questions, these questions may not even be intelligible, and that it is not material to the issues in this case and I will therefore object to this exhibit on the ground it is incompetent, irrelevant and immaterial.

Exam. Carter: I will overrule the objection, and note an exception.

(Respondent's Exhibit 21, Witness Henkle, received in evidence.)

Exam. Carter: Now, we will mark as Exhibit No. 22, the reply of the trustees of the Chicago Great Western to the protest filed in I. & S. 4244. There is no objection to that, I believe.

Mr. Walter: Off the record. Isn't that the exhibit that was objected to in the other case. I notice on my exhibit that it was objected to.

Exam. Carter: I did not hear that case, Mr. Walter.

Mr. Gladson: Of course, I object to it, Mr. Examiner. What the Great Western may have said in that case is in no way binding upon the respondents in this case.

[fol. 564] Exam. Carter: This is signed, Ralph M. Shaw, Walter H. Jacobs and Bryce L. Hamilton, and also Mr. Walter's name appears on the left hand side.

Mr. Walter: I have no objection to it being in here, but I do comment on the fact that if Messrs. Shaw, Jacobs and Bryce Hamilton had all the briefs they have filed in any case made admissible merely because their names were on them, we would have quite a large library.

Mr. Gladson: Yes, Mr. Examiner, we have more than one client in our office, and in this particular case we filed on behalf of the Chicago Great Western Trustees, not on behalf of the Stock Yards Company, and it is in no way binding upon the Stock Yards Company, and I cannot conceive of anybody holding that it would be.

Exam. Carter: Yes, this says, "Attorneys for Trustees of the property of Chicago Great Western Railroad Company," and is signed that way.

Mr. Gladson: That is right.

Exam. Carter: That will be received subject to the objection that you may have to offer.

Mr. Gladson: My objection is that it is incompetent, irrelevant and immaterial, and not binding on the respondent in this case.

Mr. Walter: May I ask, Mr. Examiner, whether the counsel who offered the exhibit stated the purpose for which it [fol. 565] was offered?

Mr. Smith: I think I did.

Mr. Walter: I confess it was my fault probably not hearing the purpose, and I apologize for having to ask the purpose. Would you mind stating it again, Mr. Smith?

Mr. Smith: No, not at all. I offer it to show the position that was taken with reference to the joint rates of the Union Stock Yards and the Great Western, to the Commission, in that case.

Mr. Walter: By the Great Western Trustees?

Mr. Smith: By this brief.

Mr. Walter: Well, do you make any contention that anything said in here has any weight at all as an admission against interests by the Yards Company?

Mr. Smith: I do not care to pursue it any farther; I think I have answered that question.

Mr. Walter: I do not care to pursue it any farther either. I am not interested.

(Respondents' Exhibit 22, Witness Henkle, received in evidence.)

Exam. Carter: You may proceed, Mr. Smith.

By Mr. Smith:

Q. Have you made some search to determine the status of your records, during the noon recess, as I understood from the statement of your counsel, Mr. Henkle?

A. Yes, sir.

[fol. 566] Q. And you found some information was available from and after 1906?

A. Yes, sir.

Q. How does it happen to be available since that time and not prior to that time?

A. I don't know.

Q. When was this fire that occurred prior to 1906?

A. My recollection is that it was in the latter part of 1905.

Q. You were with the company at that time?

A. Yes, sir.

Q. What was the extent of the fire with reference to any destruction of the company records?

A. The fire was in the record room of the company where many of its original records and vouchers were stored, and many of its books of account were stored.

Q. And additional records were destroyed in the fire of 1934?

A. Practically all of them.

Q. Practically all that were left that dealt with the situation prior to 1906 were destroyed in 1934?

A. If there were any left at that time they were destroyed, yes.

Q. The company was organized in 1865, was it not?

A. Yes.

Q. What records did you look at to determine that the power of eminent domain had not been exercised from and after 1865?

A. I could not find any reference to it in the minutes, and——

[fol. 567] Q. The minutes of what, please?

A. The minutes of the Board of Directors.

Q. Those are all available to you, are they, back to 1865?

A. I believe they are.

Q. And you have examined them?

A. No, not all of them.

Q. Oh, you have not examined them?

A. Not all of them, but I have had them examined, with the request and instruction to see if there was any reference to anything of that kind in the minutes.

Q. So such minutes as are in existence you have requested to be examined?

A. Yes, sir.

Q. And you do not know at the moment what minutes those are that are available, for what years?

A. I believe all of the years are available.

Q. And where were they kept?

A. They were kept in one of the safes, and were damaged, but not entirely destroyed.

Q. And so your statement that the power of eminent domain was not exercised is based upon information that comes to you from someone that the minutes of the company, in so far as they are extant and were examined, do not disclose that the power of eminent domain was exercised?

A. That is right.

[fol. 568] Mr. Smith: Now, Mr. Gladson, I understood you to say before the recess, that the Secretary of Agriculture had not fixed any of the rates of the Union Stock Yards? Is that so or is that not so?

Mr. Gladson: I would rather have the witness testify just what has taken place as far as the facts are concerned, since 1921. Let us avoid conclusions and let us find out what the facts are.

Mr. Smith: All right, I will avoid conclusions in this way: I ask the Commission to request the Yards Company to file for this record within ten days certified copies of the particular order made by the Secretary of Agriculture fixing a rate charged by the Union Stock Yard & Transit Company under the Administration and Stock Yards Act of 1921.

Mr. Gladson: I can do that. There has just been one order by the Secretary of Agriculture as far as I know,

and that was a discrimination order and hasn't anything to do with this case. Now, if Mr. Smith wants to find out what the company has done with respect to this rate, from this witness, I have no objection to it, but to require me to file copies of an order when he can get particulars from this witness, it seems to me is entirely out of place.

Exam. Carter: You say there has only been one order issued by the Secretary of Agriculture?

Mr. Gladson: So far as I know, there has only been one [fol. 569] order issued by the Secretary that has to do with the rates. I am talking about a formal order now.

By Mr. Smith:

Q. All right, I should like to inquire about that order. That order had to do with your reweigh charge, did it not?

Mr. Gladson: That is right.

The Witness: Yes, sir.

By Mr. Smith:

Q. And the reweigh charge you had filed was not applicable against all who used that service, as originally filed?

A. That is correct.

Q. And the discrimination order required you to remove that asserted discrimination?

A. Yes, sir.

Q. And you removed it by assessing the reweigh charge against all who used that service?

A. Yes, sir.

Q. So the result of that discrimination order and your compliance therewith was to increase your revenue in the manner you have just indicated?

A. Yes, sir.

Exam. Carter: Now, in view of that statement of Mr. Gladson that that is the only order that has been issued, of course, you do not want——

Mr. Smith: Of course, that takes care of the record.

[fol. 570] The Witness: Well, if I am now enlightened as to the question which contains the word "fixed", as to whether the Secretary fixed the rates, perhaps I have already sufficiently answered that in describing how we filed the rates, and thereafter they were placed in effect by us,

and his regulations required us to give effect to the rates in our tariff.

Exam. Carter: When you file a tariff with the Secretary of Agriculture, does he make any investigation of the rates contained in that tariff or the regulations contained in that tariff, prior to his writing the letter to you that the tariff is accepted?

The Witness: I am quite sure he does, because frequently it is a considerable period before he writes, and if it is a question of feed, I have always understood that they investigate the price of feed, and the rates as filed are proper in their general opinion——

Exam. Carter: How do you know that they do these things?

The Witness: I don't know that they do definitely, although it seems to me I have been told that they do look into them.

By Mr. Smith:

Q. Now, Mr. Henkle, in order that the record may be clear as to what this letter is, will you please produce a correct copy of the letter which you received, you say, from the Secretary of Agriculture following the filing of your initial tariff, so we may see what it says, and then determine, if desirable, whether it is made pursuant to some order issued pursuant to the power of the Secretary of [fol. 571] Agriculture under the Packers and Stock Yards Act?

A. I think I can produce such letter.

Q. During the day, or before the close of the hearing?

A. Before the close of the hearing.

Q. Now, do the instances you have been discussing here with reference to this regulatory experience under the Packers and Stock Yards Act, have anything to do with the preference you have expressed for regulation by the Department of Agriculture?

A. Well, in the general situation and in our hearings before the Secretary of Agriculture, it seems to be evident that it would be better for us to have all of our charges and all of our rates on file with and regulated by the Packers and Stock Yards Administration.

Q. In Docket 4109 you said that the fixing of your charge for the loading and unloading service would be the subject

of barter and trade between the railroads and the Stock Yards Company. Now, you take the position, as I understand it, that it would be desirable, or at least preferred to have that regulated by the Secretary of Agriculture. Is that because you believe that it is in the public interest that that charge ought to be regulated by the same regulatory body rather than left unregulated?

A. No, my reason for that is that it would be a better method of regulation of our rates, charges and services, if, from beginning to end, all of them were under one body [fol. 572] instead of under two bodies, and for that reason it would be better, I think, if all our charges were under one body, and that is our intention if we are not decided to be under the jurisdiction of the I. C. C., to file our loading and unloading charges with the Secretary of Agriculture, with all of our other charges.

Q. Yes, that is the way I understood you, Mr. Henkle, but let me put it this way: You have said now clearly that you prefer the regulation by the Secretary of Agriculture to that of the Commission. In view of what you said in Docket 4109, will you state now whether you prefer to have that done by the Secretary of Agriculture or whether you prefer to have it wholly unregulated?

A. I don't know what good it would do for me to express a preference to have it wholly unregulated when there appears to be no possibility in these days of such a situation as that.

Mr. Gladson: Of course, the question is objected to as to whether we prefer to be regulated or not regulated; and I do not recall that this witness has expressed a preference as between the I. C. C. and the Secretary of Agriculture, except as he has explained, that he would like to have one body fixing his charges.

By Mr. Smith:

Q. Now, Mr. Henkle, the loading and unloading charge up to this time, in some years, has been a charge which has been directly and physically paid to you by the carriers, has it not?

[fol. 573] A. Yes, sir.

Q. And the yardage charges have been paid to you directly by the shipper?

A. Yes, sir.

Q. And I think you have said at various times in various of these hearings that you think that inasmuch as there is some interrelation of the service and use of the facilities, it creates what you call an intolerable situation, to have part under one regulatory body and part under another?

A. Yes, sir.

Q. Well, inasmuch as the charge for part of those facilities is to be made against one group of people, and the charge for yardage is to be made against the other, there has got to be an allocation of the charges in any event under regulation, has there not?

A. That is what it would seem to imply.

Exam. Carter: What is this intolerable situation you refer to? Will you describe it a little more fully?

The Witness: It would be an intolerable situation with us, when the livestock employes start to handle livestock at the door of the car, and we continue to handle that livestock clear through the yards, and the same man may handle that same livestock in various capacities during the day more than once, and it is difficult to say just where one movement leaves off and another begins.

[fol. 574] Exam. Carter: How would placing the charges with the Secretary of Agriculture change that situation, in so far as your difficulties under this so-called intolerable situation are concerned? In other words, this service, no matter who had charge of it, would be a transportation service, would it not?

Mr. Gladson: I object to that.

Exam. Carter: Off the record.

(Discussion outside the record.)

By Exam. Carter:

Q. How would placing the jurisdiction with the Secretary of Agriculture change that situation in so far as your difficulties under this so-called quadruple situation are concerned?

A. If all our rates, charges and services were under the regulation of the Secretary of Agriculture, then I presume it would be necessary for him to investigate or decide just what proportions belonged in one field and what in another, and by his appraisal of the property and the uses thereof, he might be able better than two bodies, to state what charges should be made against the various people that were

interested in the livestock from beginning to end as it passed through our hands.

Exam. Carter: Excuse the interruption, Mr. Smith.

By Mr. Smith:

Q. Does the fact that the suspension power of the Secretary of Agriculture is limited to sixty days have anything to do with your preference for regulation by that body?

[fol. 575] A. No, I had not thought of that.

Q. That had not occurred to you, Mr. Henkle?

A. No.

Q. What precipitated the hearing before the Secretary of Agriculture in which you have been engaged for so many months?

Mr. Gladson: Oh, I object to what precipitated it. That hasn't anything to do with this case, and is not germane to the issues in this case at all.

Mr. Smith: I think we have a broad question of public policy involved, and that is a proper question.

Exam. Carter: Just a moment, was this investigation instituted by the Secretary of Agriculture?

Mr. Smith: Mr. Examiner, as I am informed,—and I am subject to correction if I am wrong—the Stock Yards Company filed some increased charges. They were suspended by the Secretary of Agriculture, and at the same time he entered upon a hearing of them and after the expiration of the sixty days limit they became effective and went into force and were charged for some time. Thereafter during the pendency of the proceedings, the Union Stock Yards filed another tariff increasing the freight rates, and that tariff was suspended, and again went into effect after the sixty days limitation, and those rates are in effect now. I want to develop that from this witness.

Mr. Gladson: What is the materiality of that?

[fol. 576] Mr. Smith: The materiality is it may have some bearing upon the preference which this witness may have for the regulation which he is advocating.

Mr. Gladson: Well, I do not see in what way it is material to this case. It seems to me Mr. Smith should direct his remarks to counsel, perhaps, as to what he is after in that respect, too.

Exam. Carter: I think that some testimony along that line in I. & S. 4109 was admitted, substantially the same

as that, although I do not believe at that time that the actual investigation of the Department of Agriculture had been started.

Mr. Smith: If you will accept my statement as a correct statement of fact, I would like to offer the fact subject to your objection as to its materiality. If not, I will develop it from this witness, if he knows.

Mr. Gladson: I would rather have you develop it from this witness.

By Mr. Smith:

Q. All right. What precipitated the investigation by the Secretary of Agriculture which you have been discussing here, and was it the filing by the Yards Company of tariffs increasing its rates and charges for the Stock yards services performed by it?

Mr. Gladson: I will object to that as not material.

Exam. Carter: I will overrule the objection, and note an [fol. 577] exception.

Mr. Gladson: And may my objection go to each question along this line?

Exam. Carter: Yes.

The Witness: We filed a tariff increasing our charges and the——

By Mr. Smith:

Q. About what date?

A. It must have been about November, 1935.

Q. And when did those charges become effective, after the suspension by the Secretary?

A. It seems to me the effective date was postponed, and they did not take effect until considerably more than sixty days afterwards.

Q. What is your best judgment as to when they became effective?

Mr. Gladson: Mr. Examiner, the tariffs are in the record which show the effective date of these increased charges.

Mr. Smith: All right.

By Mr. Smith:

Q. Just for the purpose of concluding this matter, will you indicate your judgment, as an approximation, of when that became effective?

A. I think it was January 1, 1937.

Q. Are you not overlooking the fact that you filed a second tariff increasing your charges?

A. No, that was still later, I believe.

Q. Still later than January 1st, 1937?

A. Yes, sir.

[fol. 578] Exam. Carter: What is the exhibit number of that tariff?

Mr. Hamilton: Exhibit No. 8, Mr. Examiner.

By Mr. Smith:

Q. Is this approximately and substantially correct, that you filed a tariff increasing your charges that the Secretary of Agriculture suspended; that thereafter, and during the course of the Secretary's investigation, that tariff became effective; that thereafter you filed a second tariff again increasing your charges, and that during the pendency of the Secretary's investigation those charges became effective,—those that I have just referred to, being within the last six months, and that subsequently you filed a third tariff, making certain increases?

A. I think there were only two, Mr. Smith.

Q. Have they both become effective?

A. Yes, sir.

Q. And they both became effective during the pendency of the investigation as to the reasonableness of the charges involved in the original tariff?

A. Yes, sir.

Q. Mr. Henkle, do you happen to recall what your yardage charges were in 1915, approximately?

Mr. Gladson: I object to getting into the question of yardage charges. The sole question before this Commission is whether or not respondent is a common carrier, and has nothing to do with the yardage charges in 1915 or any other time.

[fol. 579] Exam. Carter: These tariffs do not go back to 1915, do they?

Mr. Smith: No, they do not. They began, I think, with the first one filed under the Packers and Stock Yards Act.

The Witness: In 1921, I think, Mr. Examiner.

Exam. Carter: In 1921?

The Witness: Yes.

Mr. Smith: You are not willing to furnish that unless the Examiner requires you to, Mr. Gladson?

Mr. Gladson: I have made an objection to it, Mr. Smith, and I think we will hear a ruling by the Examiner.

Exam. Carter: Read the question, Mr. Reporter.

(The question was read.)

Exam. Carter: I will sustain that objection.

By Mr. Smith:

Q. You testified in Docket No. 4109 that there were certain tracks of the Union Stock Yard & Transit Company which had not been leased to any one. I ask that you submit for the record a map showing all the tracks of the Yards Company which are not subject to lease or covered by lease. Will you do that?

A. Yes, I can furnish that map.

Q. Within ten days?

A. Yes, sir.

Q. And will you look at the map when it is completed at your request, so that we can understand you are taking the [fol. 580] responsibility for the correctness of that map when it appears here as part of this record?

A. I think we can procure a map that has already been prepared by the government engineers, showing which are our tracks, and which are not; which are industry tracks and which are lead tracks.

Q. Well, you are the witness, and I am simply asking for assurance that when the map comes in its verity will be vouched for by you. May we have that understanding?

A. Well, if I can get one of the maps Mr. Zelinski prepared, I will vouch for it, yes.

Q. I am not concerned with the mechanics by which you produce it, but may we understand that the map which is offered will be vouched for by you?

A. Yes.

Q. And when will that map be forthcoming?

Mr. Gladson: Well, you asked for it within ten days.

By Mr. Smith:

Q. Will you furnish it within ten days?

A. If we are able to, yes. I do not know whether we will have to make a special map or whether we have some

already. You want a map showing the industry tracks of the Stock Yards Company?

Q. Now, state, please, what these tracks that are going to be shown on this map are used for.

A. They are used for such purposes as industrial tracks [fol. 581] are usually used for, for the setting of feed and other materials, that are used about the Yards. They are used for loading manure and such other purposes as the industry uses its own industry tracks for. They are now maintained by it.

Q. How do you operate them?

A. The cars are placed on these tracks and removed from the tracks by the Chicago Junction Railway.

Q. You have told us the Chicago Junction Railway is a corporate shell and collects dividends; does it also operate some locomotives?

A. No, when I said the Chicago Junction Railway, everybody calls the tracks formerly occupied by the Chicago Junction Railway, the Junction or the Chicago Junction. I meant those lines that were formerly operated by the Junction, that were leased to the Chicago River & Indiana Railroad, and are now operated by them only over the Junction.

Q. Now, under what circumstances and conditions does the New York Central or the River Company operate their power over these tracks owned by the Yards Company and not leased?

A. Well, we request them to set cars on these tracks, and when they are loaded we request them to move them, or they may be hay, grain, or materials that are consigned to us, that are kept on these industry tracks.

Q. Any trackage charge collected for anything of that sort?

A. No trackage charges paid.

[fol. 582] Q. They simply come in there and operate those tracks at your direction?

A. Under the regular switching, and they switch for us just the same as they do for others.

Mr. Gladson: Just a moment, may I have that question and answer read?

(The question and answer were read.)

By Mr. Smith:

Q. Approximately what is the mileage of the tracks?

A. I don't know. I do not recall that we have ever added that up.

Exam. Carter: Will your map show the mileage of those tracks? If not, I will ask that you show on the map you are to file the total mileage of those tracks.

The Witness: I don't think it would show it, but I believe it can be secured.

By Mr. Smith:

Q. The mileage of those tracks can be secured?

A. I think it can be very easily figured from the map.

Mr. Walter: The maps probably carry a scale, do they not?

The Witness: Yes.

By Mr. Smith:

Q. Will you show on those maps the mileage covered by the tracks shown on the map?

A. We will do that.

Q. Now, the Yard orders a carload of hay and feed and produce of that sort in the operation of its stock yards, does it not?

[fol. 583] A. Yes, sir.

Q. And is there much of that traffic which moves by rail into Chicago?

A. The hay and corn is the largest volume that comes in over these tracks, and, of course, that all comes from outside of Chicago, and——

Q. Well, pardon me——

A. —and they stay on these tracks the same as on any other industry track in the Chicago Switching District.

Q. Is there a subsidiary of the Union Stock Yard & Transit Company to which much of this traffic is billed?

A. I am trying to recall any subsidiary of the Union Stock Yard & Transit Company.

Q. Can you recall any?

A. No.

Q. How is this traffic billed?

A. Billed to the Union Stock Yard & Transit Company.

Q. Will you enumerate, please, the kinds and items of traffic that are billed to the Union Stock Yard & Transit

Company of Chicago, and what if any, billed out of Chicago by the Union Stock Yard & Transit Company?

A. The materials billed in are hay, corn, gravel, coal, and sometimes cement in carload lots, and the Stock Yards Company very rarely bills out anything from those tracks.

Q. If it does, what is it?

[fol. 584] A. I do not recall anything recently that the Stock Yards Company has billed out. There may have been some things, but I do not recall them at the moment.

Q. What, approximately, will the inbound traffic aggregate on an annual basis?

A. I believe you stated it was 1,000 cars in the previous hearings.

Q. I stated that?

A. I think so, but I think perhaps 800 to a thousand cars would be approximately correct.

Q. I stated in Docket 4296 that it was a thousand cars a year?

A. I think you did, in one of your statements.

Q. Actually, it varies between 800 and 1,000 cars a year?

A. That would be my judgment, without absolutely checking it to the last car.

Q. You are talking about the rail traffic?

A. Yes, and traffic other than livestock, which we have not mentioned so far.

Q. Well, is there any livestock consigned to the Union Stock Yard & Transit Company as consignee?

A. No, sir.

Q. We don't need to worry about that, then, do we?

A. No.

Mr. Smith: Now, except for these things that Mr. Gladson is going to furnish or attempt to furnish, I think [fol. 585] that is all I have to ask Mr. Henkle at the moment. I assume he is going to be around here for the time of the hearing, is that true, Mr. Henkle?

The Witness: Not having any knowledge of when the hearing might end, I would not want to say that. I hope to be.

Mr. Smith: Will Mr. Henkle be available during the course of the hearing, Mr. Gladson?

Mr. Gladson: I think so.

Exam. Carter: Have you any questions, Mr. Gladson, that you desire to ask Mr. Henkle on re-direct?

Mr. Gladson: Yes, I desire to ask Mr. Henkle one or two questions. The question I have in mind is not strictly re-direct, but I forgot to ask it on direct.

Exam. Carter: You may proceed.

Re-direct examination.

By Mr. Gladson:

Q. What are the relative revenues to the Stock Yards Company from loading and unloading and from other stock yards service?

Mr. Smith: Now, just one moment. I am perfectly willing to have that go in the record if Mr. Gladson thinks that is relevant, if he will also let the record show what these yardage charges were in 1915. I think that is a fair request.

Mr. Gladson: I have asked a question, Mr. Examiner.

Mr. Smith: I object to it unless you consent to furnishing data of the same character with reference to the 1915 situa-
[fol. 586] tion.

Mr. Gladson: I have asked a question, Mr. Examiner, and I understand Mr. Smith has objected to it.

Exam. Carter: Read the question, Mr. Reporter.

(The question was read.)

Mr. Smith: Mr. Gladson objected to my question when I tried to elicit the 1915 yardage charges, and I object unless he is willing to have that go in. If he is willing to withdraw his objection to my question, I am willing to withdraw my objection to his question.

Mr. Gladson: I am talking about revenues at the present time, Mr. Smith. I want to know what proportion of the income of the Stock Yards Company comes from the railroads and what part comes from the shippers of livestock.

Exam. Carter: The same principle is involved. I will sustain the objection unless you agree to furnish the information.

Mr. Gladson: Well, I won't agree to furnish the information.

Exam. Carter: I sustain the objection.

Mr. Gladson: I offer to prove by this witness that if he is allowed to testify, that approximately ten per cent of the gross income of the Stock Yards Company comes from loading and unloading service, and the balance from the other stock yards services.

Mr. Smith: I object to the offer unless the Stock Yards [fol. 587] Company is willing to let the Commission have also the information as to what its yardage charges were per car on the various shipments of animals in 1915.

Mr. Gladson: I have not objected to giving the Commission any relevent information we have, and I have not objected to giving the Commission the information concerning the 1915 charges, and I have not objected to giving Mr. Smith or anybody else any other information we have that they cannot get themselves, that is relevant to the issues in this case.

Now, is it understood that the Examiner has ruled that my offer of proof will not be accepted?

Exam. Carter: Yes, that is true.

Mr. Gladson: Yes, and I take an exception.

That is all.

Exam. Carter: Is that all?

Mr. Gladson: That is the only thing I have of this witness.

By Exam. Carter:

Q. Mr. Henkle, I am going to read from the decision of the Commission in I. & S. 4109, reported in 213 I. C. C. at page 330. I am going to read some sentences slowly, and if they are incorrect statements of fact I want you to stop me and tell me.

Reading now from page 331:

"Prior to 1887, respondent operated both its stock yard and railroad facilities in its own name. From 1887 to 1893, the railroad facilities, except the loading and unloading [fol. 588] chutes and pens, were operated by a transfer association controlled by the carriers."

A. I do not recall anything about the transfer association.

Q. That was the testimony that you gave in I. & S. Docket 4109.

A. That I gave?

Q. Well, it was based on the testimony in I. & S. 4109, and I think you were the only witness who testified for the Stock Yards Company.

A. Well, I do not recall that detail at the moment, I could not at this time say whether or not it was correct.

Q. All right. (Reading.)

"In 1893 respondent resumed operation of all its facilities."

A. I do not recall that testimony.

Q. (Reading.) "In 1897 it leased its railroad tracks, property, and equipment for a term of 50 years to the Chicago & Indiana State Line Company, retaining for itself the loading and unloading platforms and facilities used in connection with its stock yard business.

"On January 1, 1898, the lessee company above mentioned, consolidated with the Chicago, Hammond & Western Railroad Company, the consolidated company becoming known as the Chicago Junction Railway Company, hereinafter called the Junction. Under the terms of the lease above re-[fol. 589] ferred to, respondent received first from the Chicago & Indiana State Line Company, and later from its successor, the Junction, two-thirds of the profits derived from the operation of the leased properties."

A. That is correct.

Q. (Reading.) "In 1907 the Junction sold a belt line which is operated around the city of Chicago, thereafter retaining and operating only those railroad properties owned by respondent and which had been leased from it under the 50-year lease of 1897."

A. I think that is true, also.

Q. (Reading.) "About that time the Chicago Junction Railways & Union Stock Yards Company, a holding company organized under the laws of New Jersey, became owner of 90 per cent of respondent's capital stock and practically all the capital stock of the Junction."

A. That is what the record shows, sir.

Q. (Reading.) "Pursuant to respondent's charter and under an agreement with the Junction, the trunk lines entering Chicago were granted trackage rights over the railroad."

A. That is true.

Q. (Reading.) "Operating under the trackage rights the trunk lines delivered livestock directly to the platforms of respondent."

A. That is right.

[fol. 590] Q. (Reading:) "There was a special service as to horses and mules, shipments thereof being transported by the trunk lines to the platforms of respondent and being there picked up by the Junction and hauled to the unloading chutes for horses and mules."

A. I am sure that is correct.

Q. (Reading:) "The Junction itself carried on a complete railroad business, receiving carload shipments of 'dead freight' from the trunk lines and either delivered the same to the consignees, if situated on its tracks, or to the receiving tracks of forwarding trunk lines."

A. That is correct.

Q. (Reading:) "Less-than-carload freight was delivered at the freight depot known as the Union Freight Station, the Junction loading it into cars and hauling them to the receiving tracks of the trunk lines."

A. I believe that is correct, although I had no direct connection with the actual carrying on of that business, but I know that that was what was done.

Q. Yes. (Reading:) "The trunk lines paid a trackage charge for the use of the tracks leading to the stock yards and, in turn, published a charge of $2 per car, increasing their total rates by that amount for the hauling of livestock from points of origin to the platforms of respondent."

[fol. 591] I don't know whether you can answer that question or not. About the $2 charge, you know there was a $2 charge?

A. Yes, sir.

Q. (Reading:) "Respondent performed the unloading and loading service, supplying the platforms, chutes, pens, and other facilities."

That is correct, is it not? I will read it again (Reading): Respondent performed the unloading and loading service, supplying the platforms, chutes, pens, and other facilities", or we will cut out "other facilities", and just say "supplying the platforms, chutes, and pens".

A. I don't know whether the word "supplying" quite indicates it, but we will agree with that.

Q. I do not think it has any sinister meaning.

A. What I mean is in connection with that, these platforms were used whether we supplied them definitely for that purpose alone or not.

Q. (Reading:) "It received the waybills thereon from the trunk lines, advanced to them the freight charges and collected such charges from the consignees."

A. That is correct, on outbound shipments.

Q. (Reading:) "In December, 1913, the lease above referred to was cancelled"——

A. Yes, sir.

[fol. 592] Q. (Reading:) "and a new one entered into, whereby respondent's railroad facilities except those used for loading and unloading livestock, were leased in perpetuity to the Junction at an annual rental of $600,000, in lieu of the two-thirds share in the net profits of operation theretofore received. In May, 1917, respondent, by tariffs filed with us, increased its carload charges for loading and unloading livestock from 25 and 50 cents to 50 and 75 cents, respectively."

A. Yes, sir.

Q. (Reading:) "The line-haul carriers refused to absorb this extra charge imposed by respondent, with the result that it was exacted from the shippers."

A. That is correct.

Q. (Reading:) "Subsequently, respondent filed a cancel-ation notice, effective September 1, 1917, in which it proposed to altogether withdraw and cancel its tariffs filed with us and to make its charges for loading and unloading livestock the subject of an operating arrangement with the carriers;".

A. That is my recollection.

Q. (Reading:) "Upon protest of certain shippers the cancel-ation notice was suspended and a hearing was entered upon." You do not have to verify that.

(Reading:) "On May 19, 1922, the Junction made a lease indenture, joined in by respondent, subleasing the railroad properties held by it under the lease from respondent, and [fol. 593] leasing other property, to the Chicago River & Indiana Railway Company, hereinafter called the River Road, for a period of 99 years, and thereafter, at the option of the lessee, in perpetuity, the said indenture providing for an annual rental of $2,000,000."

Mr. Gladson: Now, Mr. Examiner, that lease is in the record. There may be some conclusions as to the leasing, and so forth, with which we will want to quarrel on the conclusion of this witness.

Exam. Carter: Yes, but I am just establishing the fact that that lease was made on that date, and I am not attempting to have him construe the lease. I just want to have him establish the fact that the lease was made on that date, and the annual rental.

(Reading:) "All the capital stock of the River road was at the same time acquired by the New York Central Railroad Company."

Now, these services, referring to the loading and unloading services,—"consisted and consist today of the unloading of livestock from railroad cars into unloading pens located on respondent's property and of the loading of livestock from loading pens into railroad cars. Such services have always been performed by respondent's employes, and under respondent's rules the services cannot be performed by persons who are not employed by respondent."

Is that correct?

[fol. 594] A. Yes.

Q. (Reading:) "The livestock is now and except for a period early in respondent's history, always has been, hauled by the trunk lines to the platforms where respondent furnishes the services and facilities to complete the transportation."

To complete the transportation is a conclusion. That part is corrected to read:

"The livestock is now, and, except for a period early in respondent's history, always has been hauled by the trunk lines to the platforms where respondent furnishes the services and facilities."

A. That is right.

Q. And now add to that the loading and unloading charge?

A. Yes.

Q. It is true also now that you demand that the service be performed by none other than the respondent, that is, by the Union Stock Yard & Transit Company?

A. Yes, sir.

Q. The trunk lines absorb respondent's charges for this part of the transportation. You need not answer that.

Mr. Gladson: Of course, we do not admit it is transportation.

Mr. Fulbright: I do not think it makes any difference.

Exam. Carter: You mean section 15/5 is unconstitutional, is that it?

[fol. 595] Mr. Gladson: No, but as applied to the Stock Yards Company, I do not think the Stock Yards Company is a common carrier in respect of or in regard to that transportation. I haven't any doubt as applied to the railroads it is transportation.

Exam. Carter: Respondent's charge for unloading livestock has been increased from 25 cents per car to its present level, $1.25, is that correct?

The Witness: For single deck, and $1.50 for double deck, yes, sir.

By Exam. Carter:

Q. Now, those statements I have read to you from this report, which were based on the situation in existence at the time of the hearing in I. & S. 4109, have those facts changed since that time or are they the same today?

A. What is the date of that 4109?

Q. That was submitted October 1, 1935, and the testimony was probably given some time during 1935.

A. I believe the physical procedure as described there is approximately the same now as it was then. I do not recall any specific change.

Q. Can you state how many cars of livestock are received at and shipped from the stock yards now by rail annually? got one of the Red Books there?

A. In the year—well, I haven't got my book. Have you

(Book referred to passed to Mr. Henkle.)

[fol. 596] The Witness: Well, in the year 1936 there were received at the yards 156,000 carloads, by converting the animals which were received by truck into comparable carloads. In other words, that 156,000 carloads would mean all of the stock that arrived, and had it all arrived by rail it would have been in 156,000 carloads.

Does that answer your question?

Q. No, I wanted to get the number of shipments by rail.

Mr. Smith: I would like to ask that the Red Book for 1936 be put into the record, Mr. Examiner. It is an official statement published by the carriers, goes back a number of years, and I think it was put in in Docket 4244. The respondents would like it in here in Docket 4296.

Mr. Gladson: On what theory is it relevant when the figures of the company are not relevant?

Mr. Smith: I think it is quite important to show that this Union Stock Yards Company stands over at the neck of the bottle and unloads more than 100,000 cars a year and says nobody can come on the place to do it, and we

ought to be relieved by the Interstate Commerce Commission from these charges for that sort of service.

Mr. Gladson: What about all the other information contained in it? On what basis do you think that is material if you do not think the revenue for loading and unloading is material?

[fol. 597] Mr. Smith: I suppose there is a lot of material in this Red Book that is not strictly relevant. If you think it is important to cull out the information, I am willing to have that done, but Mr. Shaw raised no objection in 4244, and my recollection is it was admitted in 4109, and if we are going to deal with technical objections of that character, I will enter with you upon some arrangement to cull out some information you deem important. My request is that that book be offered for the record.

Mr. Gladson: I have no desire to be technical, and if the Examiner thinks it is material I have no objection.

Exam. Carter: I would like to know the number of shipments of carloads of live stock received and shipped from the stock yards by rail for a representative period.

Mr. Gladson: I will withdraw my objection if Mr. Smith wants to put it in.

Exam. Carter: Now, if that Red Book shows that—I don't know whether it does or not——

Mr. Smith: It does show that.

The Witness: Shall we produce that information?

Exam. Carter: If it is in this Red Book——

Mr. Smith: It is in this Red Book produced by Mr. Henkle, and if you will produce it at my request I will appreciate it.

Exam. Carter: Supply several copies and make it an exhibit.

[fol. 598] Mr. Smith: Yes, supply several copies within ten days.

The Witness: My offer was in response to the Examiner's request that you furnish the information as to the number of cars that were received and shipped by rail in 1936.

Mr. Smith: Now, Mr. Henkle, I ask that that book be put in the record. Your counsel has said he has no objection to it. Now, will it be put in the record, or not, that is the question?

Mr. Gladson: I will furnish the figures requested, and if you desire this introduced as an exhibit, I have no objection.

Mr. Smith: May I have permission then to offer those figures within ten days after this hearing?

Exam. Carter: That permission is granted. Mr. Henkle, when you were on the stand at the first hearing in this case you were asked to describe the method of procedure followed in making outbound shipments of livestock from the stock yards.

The Witness: Yes, sir.

Exam. Carter: Would you describe that for us again? It is on page 51 of the record, and maybe a few pages before that.

The Witness: On page 48——

Exam. Carter: Yes.

The Witness: —I described that, according to my copy.

Exam. Carter: Yes, I think that is where it is. Now, if you recall that testimony, do you remember I asked you a question: When you hold stock in certain pens before you [fol. 599] determine where the cars are to be set, do you hold them for the account of the owner of the stock or not?

Mr. Gladson: Now, just a minute, I object to that. That is a conclusion I do not think this witness should be called upon to make. He has described the physical handling. Whether they hold it for account of the owner or railroad is a question of law.

Exam. Carter: In other words, you cannot answer, is that right?

The Witness: Well, I do not feel qualified to answer that because it has been a question of dispute in practically all of the hearings, Mr. Examiner, in which I have testified.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: Mr. Gladson, on page 48 of the record the witness said this:

"If animals are purchased at the Yards for out shipment, the consignor delivers them to the Yards Company, as agent for the outbound carrier."

Now, of course, the question of whether an agency exists is a matter of law, I take it?

Mr. Gladson: I think so.

Mr. Smith: And on your theory that may be stricken from the record as a statement of this witness made without any——

Mr. Gladson: What page is that?

[fol. 600] Mr. Smith: Page 48, right on the point we are talking about.

Mr. Gladson: No, I don't think I will agree to that.

Exam. Carter: That is a conclusion of law, just the same as the other.

Mr. Walter: Sometimes the witness can express that better than the lawyer.

Mr. Gladson: And that went in without objection, Mr. Examiner.

Exam. Carter: I will tell you gentlemen that as to this description of the procedure for outbound shipments, on page 48, and also page 51, neither Commissioner Splawn, nor I, could understand it very well at the time. That is the reason I suggested to this witness that he might explain it again.

Mr. Gladson: I will be very glad to have the witness tell just what is done, and all the facts in connection with it, as to outbound shipments.

Exam. Carter: Yes, as to your outbound shipments.

The Witness: Do you want me to tell just in a general way?

Exam. Carter: Let us just take this situation, somebody calls you up on the telephone and says they want to ship a carload of livestock out by rail. Now, let us take it from that point. I suppose they call somebody on the telephone; I don't know what they do. Whatever they do.

The Witness: Well, when livestock is to be shipped out [fol. 601] by rail, the first knowledge the Stock Yards Company has of this fact is when the shipper receives the livestock after it is weighed over the scales. The seller weighs it over the scales to the shipper. It is then put in a pen awaiting the order of the shipper——

Exam. Carter: Of the buyer.

The Witness: Well, the buyer would be the shipper.

Exam. Carter: Oh, yes, the outbound shipper.

The Witness: The outbound shipper, yes. The shipper orders his car——

Mr. Gladson: From whom, Mr. Henkle?

The Witness: From the Stock Yards district agency, and then he presents to us an order authorizing us to deliver the livestock to the railroad over which it has to be shipped. That gives us the information as to the pen in which the livestock is held——

Exam. Carter: In other words, you have pens in which you place livestock going to certain destinations? Is that it?

The Witness: No, as they come off the scale they might come off of any one of fifty scales scattered around the

yard, and they would have to be identified after they came over the scales, and gathered up and taken over to the shipper, and would there be placed in other pens until it was ascertained in what chute they would have to be placed in order to be loaded into the proper car.

[fol. 602] Mr. Gladson: When you speak of the Stock Yards District Agency, is that an agency maintained by the Stock Yards Company or the railroads?

The Witness: It is maintained by the railroads. We have nothing to do with that.

When the cars are set, the Stock Yards Company men drive the animals into the cars and close the doors and compile their records of what animals have been shipped in the various cars.

By Exam. Carter:

Q. In other words, when a person has certain livestock that he wants to be shipped out, that livestock may be in different parts of the yard?

A. That is correct.

Q. Now, the first thing he has to do is to get that livestock assembled together, is that right?

A. Yes, sir.

Q. So he notifies you that he has outbound shipment going to a certain point; then you instruct your employes to gather the separated shipments in the particular pens, is that right? Get them all together?

A. They would be gathered together in the vicinity of the platform at which the railroad designated by the shipper usually sets its cars.

Q. Yes, and would that pen be close by the loading or unloading platform?

A. It usually is, but it might be at any part of the yard [fol. 603] that the entire load would be collected together and taken as a whole over to the loading pens in the vicinity of the chutes where the railroads set their cars.

Q. Now, when your men assemble these separated shipments, gather them up and drive them to the pen near the loading platform——

A. Yes.

Q. —do you make a charge for that?

A. There is no specific charge for that. That is one of the specific handlings we have been driving at for years to find out whether it was done for some specific person,

if so, for whom, and what specific charge should be made for it and what specific charge ought to be made for that service which is different in the case of every shipment. It varies universally.

Q. You do not make any yardage charge for that service?

A. There is no yardage charge that could be assigned or allocated specifically to that particular work. That is a part of the general work of receiving livestock shipments inbound and shipping the livestock outbound.

Q. In other words, you do make a yardage charge when stock is driven from an unloading chute through your pens, for instance, to the commission firms' pen, don't you?

A. Yes, but the yard charge——

Q. I mean you do make a yardage charge in that instance?

[fol. 604] A. Yes, there is a yardage charge that covers a multitude of services.

Q. Yes. Now, I am not saying it does, but it may cover both services, is that what you mean, it may cover the movement of the inbound shipments through the yards to the particular pen, and it may cover the outbound service on shipment outbound, is that correct?

A. Well, as I have stated frequently it is very difficult to definitely define just what services are covered by what charges. I can accurately describe all the physical services we perform and I can tell you definitely the sources that pay us for those services as a whole, but the services overlap each other in almost every case.

Q. Let me ask you this question——

Mr. Gladson: Mr. Examiner, may I interrupt you for a moment? I find the questions you have been putting to this witness as to whether the service is included in the yardage charge is already answered in the record in Exhibit No. 8, in the schedule of tariffs filed with the Secretary of Agriculture, which says, "Yardage charges named above do not include yarding from scales, after sale, on outbound shipments by rail".

I take it, as a matter of law, this provision in the effective Stock Yards tariff would supersede anything that this witness might testify.

[fol. 605] Mr. Smith: Have the record show what tariff that is, will you please?

Mr. Gladson: That is tariff number 10.

Mr. Smith: When did that statement first appear in that tariff?

Mr. Gladson: I don't know. All the tariffs are here and perhaps you can pick it out.

Mr. Smith: Just look at No. 9. Perhaps you can tell us whether it was in 9. Look at 8 and 9 and tell us if you will, Mr. Heinemann, when that started?

Mr. Gladson: It appears in schedule No. 9 filed with the Packers and Stock Yards Administration. It appears in Amendment 13 to tariff number 8.

Mr. Smith: Now, what is the date of that amendment 13?

Mr. Gladson: That was effective February 28, 1935.

Exam. Carter: Then we really have this situation, whether under that tariff or not, that you do assess a yardage charge when your employes do drive the stock from the unloading chute to either your pens or their pens beyond, is that true?

A. There is a yardage charge.

Q. Which you assess?

A. Which we assess and which covers a multitude of services, some of which you may avail yourself of and others that you may have but you don't use.

Q. Yes, but I say there is a yardage charge assessed and [fol. 606] collected from the consignee?

A. Yes.

Q. In a situation of that kind on the inbound shipment, is there any charge assessed?

A. Yes, on the inbound shipment.

Q. On the outbound shipment there is no charge of any kind assessed for driving the livestock, wherever it may be, to the loading chute, is that correct?

A. The P. & S. tariff, I think, you will find covers the provision on outbound shipments. Have you got it there, Mr. Gladson?

Mr. Gladson: That is already in the record, Mr. Examiner.

The Witness: Section 12 of U. S. Y. & T. Co. No. 10, filed with the Secretary of Agriculture, reads as follows:

"Outbound Shipments

"A charge of $3.00 per car, exclusive of the loading charge, will be made on all outbound movements for services rendered beyond the scale facilities. The charge will

be made against the carrier receiving the outbound haul on such shipments."

Mr. Smith: May I ask one question there?

Exam. Carter: Yes.

Mr. Smith: It is your position, then, Mr. Henkle, that the service which you perform on this outbound traffic that is under discussion here is a service that is covered by the [fol. 607] freight rate and that you ought to be compensated for out of the freight rate?

Mr. Gladson: Just a moment, I object to going into the freight rates. He has no connection with freight rates.

Mr. Smith: He is attempting to get it from the carriers and that is the only place it can come from, is the freight rate.

Mr. Gladson: All right, the only thing he is trying to do is to get the $3.00 from the railroads. That is a matter that is argument and is not within the knowledge of this witness who has no connection with freight rates.

Mr. Smith: May I have an answer, Mr. Examiner?

Exam. Carter: Read the question, Mr. Reporter.

(The question was read.)

Mr. Gladson: Your Honor, that purely calls for a conclusion of law.

Exam. Carter: Let me ask one question right there before I rule on that question. Is it your position that the service performed on the outbound shipment is a transportation service?

Mr. Gladson: I have the same objection to that.

Exam. Carter: I would like to ask this witness. He apparently had something to do with this, he has been general manager of this company and his statement is not conclusive, of course, but this is what I cannot understand; on your inbound shipments—and I wish you would explain this to [fol. 608] me—On your inbound shipments you apparently take the position, or I mean you do make a yardage charge for service beyond the unloading pen, do you not?

The Witness: Yes, sir, and we also——

Exam. Carter: And you make that service charge against the shipper or the consignee, don't you?

The Witness: There is a yardage charge which he pays, and the movement you just described is covered by Section

12 on inbound shipments where there is a charge of $3.00 per car which is beyond the unloading.

Exam. Carter: Do you mean under this tariff, then, that you do charge a yardage charge on an inbound shipment and also a $3.00 charge in addition to that?

The Witness: Yes, sir.

Exam. Carter: And who do you make those charges against?

The Witness: We make them against the railroads, in accordance with the records.

Q. (By Exam. Carter) But you have not been able to collect them?

A. No, sir.

Q. But on the outbound shipments you only make one charge, is that right, for a service which is in some respects similar? In some respects, now, I don't mean exactly the same.

A. No, on the outbound shipments there is a charge of $3.00, exclusive of loading the cars.

[fol. 609] Q. But no yardage charge?

A. No yardage charge, but the railroad does not pay the yardage charge.

Q. All right, we will be through in just a minute. Let us take an inbound shipment. On an inbound shipment there is a charge of how much, $1.25, on the single deck car, which the railroads pay to you?

A. Yes.

Q. Then there is a charge of $3.00 per car which you would like the railroad to pay to you but which they do not pay to you?

A. Yes, sir.

Q. Then, in addition to that there is a yardage charge which the shipper or consignee actually pays?

A. Yes, sir.

Q. Now, on the outbound shipment there is no yardage charge, as such—or, I will put it this way: On the outbound shipment, there are just two charges, the $3.00 charge you have described as it appears in this tariff, is that correct?

A. Yes, sir.

Q. The $3.00 charge which you would like to collect from the railroads but do not, and the $1.25 charge which you actually collect from the railroads, is that right?

A. That is right.

Q. Now, how do you explain the difference in the situation [fol. 610] on the inbound and the outbound shipments? What explanation have you for that?

A. I haven't any explanation, other than what we have set forth in this tariff.

Mr. Gladson: I think, Mr. Examiner, that question would be answered if Mr. Henkle read into the record what the inbound $3.00 charge per car in the P. & S. tariff really covers.

The Witness: Two different points entirely.

Exam. Carter: Yes, I know the tariffs are different on the inbound and outbound shipments.

Mr. Gladson: Yes.

Exam. Carter: But I am not speaking about tariff provisions. I want to know what explanation he can make of the different situation as to shipping inbound and outbound shipments.

Mr. Fulbright: Mr. Examiner, may I inquire how that can possibly be relevant to this case? I cannot see it.

Exam. Carter: Well, it is a question of to what point the transportation extends. That has some bearing on that question, and, of course, if we haven't jurisdiction of the transportation, even though the Stock Yards Company is a common carrier, we could not prescribe a charge for service which is not a transportation service.

Mr. Fulbright: Nor is the contention being made that the Commission can prescribe the $3.00 charge. In fact, the [fol. 611] Commission's decision very clearly stated, I should say, that the railroads' responsibility ends when they have put the shipments where the consignee can come and get them out of the car and put them into the nearest pen,—but driving them through the yards, that is something different, and that has been so held in the Allied Packers Cases, and other cases, therefore, I cannot possibly see the relevancy of their going into a justification for a different charge which we do not claim the Commission has any jurisdiction over, and neither does the Commission claim it has jurisdiction over, because the Commission's decision followed rather closely the decision in the Allied Packers Cases. Now, we have had a lot to say about it, but I do not see its relevancy in this record.

Exam. Carter: I think we would like to get a little light on the question of where the transportation ends. It is a pretty difficult question, it seems to me.

Mr. Fulbright: It seems to me we are going to have to resort to the decisions of the Commission and the courts.

Exam. Carter: They may have established it for those particular cases under discussion, but certainly the court's decision in the Hygrade case did not decide it except as to those particular shipments in that particular case.

Mr. Fulbright: The Commission has said the functions of the railroad company end when it has unloaded the shipment. It does not say any other services have to be performed by [fol. 612] the railroad company after its services end.

Exam. Carter: No, I do not think it says it has to perform any other services.

Mr. Fulbright: It may have to perform some accessorial services, but I am talking of the transportation of livestock from point A to point B, and I think that is quite well settled, and certainly there is no contention made here that the $3.00 charge comes into that, so I just cannot see how that is possibly helpful to the Commission.

Exam. Carter: No, but the contention might be made here that the $3.00 charge is not for transportation, and the Commission might decide otherwise. I do not say that it would. But, in that event it would be relevant to the issue of whether or not this is transportation subject to the Act. However, I haven't any more questions along that line.

Mr. Fulbright: Pardon me for making the dissertation.

Exam. Carter: That is all right, but my understanding is the Commission has not decided that question definitely.

Mr. Fulbright: Well, you and I do not read those decisions alike, then.

Exam. Carter: That may be true.

Q. (By Exam. Carter) Now, let me ask you—you will probably say this is not material either, but can you tell me, taking direct shipments to packers, for instance, my understanding is that in some cases the packers send their own [fol. 613] employes to the unloading pens and do the driving with their own employes, is that correct?

A. Sometimes.

Q. Now, is that livestock driven through the alleys in the Stock Yards, or over some special contrivance or apparatus?

A. They may be driven over any of the alleys or streets in the Yards. They may be driven over viaducts. They may be driven to the second stories of the hog houses or sheep houses. In fact, each particular shipment takes the most

convenient route across whatever facilities there are between him and where he wants to go.

Q. But in the case of direct shipments to the packers, how are they usually driven at the time they are driven by the packers' employes?

A. It depends entirely on which one of the ten unloading platforms the hogs are unloaded on. They may arrive at any one of the ten platforms. These platforms vary from a short distance to quite a long distance to the packing houses and the route would be different for every shipment, depending on whether it was southwest of Laurel street, or north or south of the hog house, and the consequent character of the business being carried on in that territory between where the livestock is and where they want to get it, because they might go many different routes to avoid such traffic as is in the way.

Q. When they go over different viaducts, I suppose the [fol. 614] viaducts are connected with pens in certain parts of the yards, or are they connected with all the unloading pens?

A. Well, on the unloading pens, there is an alley between the unloading pens and that alley has outlets at its ends, and sometimes they might leave the alley and go along the south drive or along the east or west drive, there is no fixed route.

Q. In the case of a direct shipment to a packer, do you or do you not assess your yardage charge?

A. We do assess a yardage charge.

Q. This $3.00 charge we have been speaking about, or your regular yardage charges?

A. Both.

Q. Not against the packers, however?

A. Any yardage charge is against them?

Q. Yes, your regular yardage charge and $3.00, when they drive the livestock themselves to their yard?

A. Yes, sir.

Mr. Smith: May I ask a question or two about that?

Exam. Carter: Yes.

Q. (By Mr. Smith) Is it not a fact all the direct shipments are driven by the packers' employes?

A. It is not.

Q. What percentage of them are?

A. I don't know the exact percentage, but many of the [fol. 615] direct shipments arrive at night, and they are yarded by our men.

Q. They are yarded by your men?

A. Yes, sir.

Q. Those that come at night?

A. Yes, sir.

Q. Then who drives them across the yards so far as the packers are concerned, when they are driven?

A. The packers' men.

Q. And those that do not arrive at night, by whom are they driven to the packers' establishment?

A. If the packers' men are there at the time the livestock is unloaded, they take them and drive them over to the packing house.

Q. Now, is it not true and have you not testified that all, or practically all of the direct shipments to the packers are driven across the yards' property by the packers, to their own establishment?

A. They are driven over the yards by the packers from whatever point they happen to get them. Whether direct, or from some place we take them to, they still pass over our yards to their place.

Q. The driving in the yards is by the employes of the packers, at that time?

A. After they take possession of them, yes.

Q. And they take possession of them either at the unload- [fol. 616] ing chute or at the pen adjacent thereto into which you place them, when they come in at night?

A. That is right.

Q. And for how many years have you assessed a yardage charge against the packers on that traffic, approximately?

A. Ever since it has been permitted, and that goes back perhaps to 1910.

Q. And the yardage charge is the same, is it not, whether the packers take possession of them at the unloading chute and drive them across your property to the packers' property, or whether there is the intermediate stop to which you refer, with reference to those that come in at certain times in the day when they are put into adjacent pens?

A. The yardage charge is the same.

Q. And that yardage charge long antedated the publication of this $3.00 charge, did it not?

A. Yes, sir.

Q. And you have said to the Examiner now, as I understood you, that at the present time, part of that $3.00 charge which has been present in various forms, applies to that driving service, as well as the yardage charge that is assessed against the packers, is that right?

A. No, I do not think I quite said that.

Q. Well, what did you say?

A. I said that the tariffs described accurately what the [fol. 617] $3.00 charge is for, and in addition to that $3.00 charge there is a yardage charge.

Q. Yes, and does the $3.00 charge you have there in that tariff in front of you cover the driving service or the service performed on direct shipments taken possession of by the packers immediately at the unloading chute?

A. Shall I read exactly what it says?

Q. No, I want you to tell me exactly whether it does or does not. Read the question.

(The question was read.)

Q. I will put it this way: Are there two charges published by you with the Secretary of Agriculture, namely, the $3.00 charge and the yardage charge assessed against the packers, which both cover whatever use of the facilities of the Yards Company are involved in the driving of direct shipments over the property of the Yards Company, which has been taken possession of by the packers at the unloading chutes?

A. The $3.00 charge is not assessed against the packers.

Q. It is assessed against no one, but it purports to be assessed against the railroads, is that right?

A. That is right.

Q. And it purports to cover the use of the facilities involved in the driving of this stock of the packers?

A. It covers exactly what it states in the tariff, the $3.00.

Q. Now, just answer that question.

[fol. 618] Mr. Gladson: I object to this line of questioning as improper, Mr. Examiner, in the first place, and in the second place the Secretary of Agriculture spent about two years finding out about the $3.00 charge, and also the yardage charge, things that apparently were within his jurisdiction.

Furthermore, the P. & S. tariff is already in the record, which defines exactly what the $3.00 charge covers.

Mr. Smith: I will say there is very little information elicited from this witness in that proceeding as to what

these tariff charges were supposed to cover in the way of services, because he stated time and time again he was unable to answer what they covered. If he can answer, let him answer now.

Mr. Gladson: I object to what the witness said in that record.

Mr. Smith: You referred to the other record. If he can answer, let him answer; if he cannot, let him say so.

Exam. Carter: Are you a tariff expert?

The Witness: A railroad tariff expert?

Exam. Carter: Yes.

The Witness: No, sir, I know nothing about them.

By Mr. Smith:

Q. How about that tariff in front of you? That is not a railroad tariff, that is your tariff?

A. Yes.

Q. Maybe you can answer the question from your tariff.

A. I have endeavored to answer it from the tariff that [fol. 619] sets forth specifically what the $3.00 charge is for.

Mr. Smith: By reading the provision. All right, we won't press the question.

Mr. Gladson: Mr. Examiner, pursuant to the request of Mr. Smith, we have investigated the holdings of the Chicago Junction Railway and Union Stock Yard Company, the so-called Jersey Company, and we find that the Jersey Company owns the stock of the respondent, and also a considerable amount of the stock of the Chicago Junction Railway Company, which is the non-operating lessor company of the properties now operated by the subsidiary of the New York Central, and that the Jersey Company does not own the shares of any railroad company except the shares of the Chicago Junction Railway Company. That the stock of the Jersey Company is owned by the Chicago Stock Yards Company, a Maine corporation, which does not own stock in any railroad company, except 22 shares in a small branch subsidiary of the New York, New Haven & Hartford Company.

That was information which Mr. Smith asked us to furnish.

Mr. Smith: Who owns the Maine Company, Mr. Gladson?

Mr. Gladson: I have Poor's Manual here, which shows

F. H. Prince as president; F. H. Prince, Jr., vice president; James A. McDonough, vice president; and F. R. Pegran, secretary-treasurer.

Mr. Smith: But who owns the Maine Company, Mr. Gladson?

Mr. Gladson: The Maine Company, as I understand, is [fol. 620] controlled—or perhaps, Mr. Henkle, am I correct in saying that the Maine Company is controlled by Mr. F. H. Prince?

The Witness: I believe it is.

Mr. Smith: That is one of the things I attempted to get from you this morning, Mr. Henkle. I guess we did not understand each other.

Mr. Gladson: No, you asked the question whether he owned it or not, and this question was whether he controlled it.

By Mr. Smith:

Q. What did you mean when you said the Jersey Company owned a considerable amount of the stock of the Chicago Junction Railway?

A. They own all of the $13,200,000 stock of the Union Stock Yard & Transit Company, the Illinois corporation; and also own $5,500,000 capital stock of the Chicago Junction Railway.

Exam. Carter: That is all of it, is it? I mean is that latter figure the entire stock of the Chicago Junction Railway?

Mr. Gladson: I cannot answer that question, unless, Mr. Henkle can.

The Witness: I believe it is.

Mr. Smith: I would like to make a statement about that, Mr. Examiner, so that our position will be clear on the record.

In Mr. Henkle's discussion of the law on this subject in the original hearing he said this——

The Witness: What page?

[fol. 621] Mr. Smith: Starting at the bottom of page 13, "Subsequent to the decision of the Supreme Court in the Pfaelzer case, the Yards Company, for the first time, filed with the Interstate Commerce Commission tariffs containing its charges for loading and unloading livestock for the railroads. This tariff stated that the service was performed

for the railroads by the Yards Company as agent of the railroads."

I think I should have started with your thesis on the bottom of page 12, Mr. Henkle.

"The conclusion of the court, reached in that case"—referring to the Supreme Court decision—"was that the Yards and the Junction Company were both common carriers subject to the Interstate Commerce Act; that they should be required to comply with those sections of the Act applicable to common carriers and that the proposed payment to the Pfaelzer Company should be prohibited as a rebate. This decision of the Court, so far as the Yards Company was concerned, was primarily based upon the fact that the Yards Company owned the railroad facilities operated by the Junction Company; that all or a majority of the stock of both companies was owned by the Investment Company; that there was a substantial unity of operation by all three companies, and that as between the Yards Company and the Junction Company there was a division of profit arising from the operation of the railroad companies."

Now, Mr. Henkle further test-ying undertook to show [fol. 622] that in principle, as I understood him, that situation had changed, in that the ultimate ownership of the Yards was now such that there was conjoined with it no ownership or interest in an operating company.

It is our position that the Supreme Court would have reached the same conclusion that it did, wholly apart from the circumstances to which Mr. Henkle referred in the part that I have read. However, the Yards Company disagrees with us on that score and thinks otherwise. The Yards Company says that that is a highly relevant consideration, and so I ask the Yards Company if it is willing to show in this record that there has been a change in principle, in that regard, and I suggest that it is relevant in that connection to know whether the ultimate ownership of the Yards owns also any interest in any operating company. I do not ask the Commission to require that that be furnished. I say that the difference relied upon has not been established.

Mr. Gladson: Mr. Examiner, I thought we had just furnished the information which Mr. Smith requested. I ask you to accept my word for it, Mr. Smith.

Mr. Smith: I do not question the accuracy of that data, that is, I do not question but what you believe it is accurate,

that maybe is true, but it does not at all go to the question I have raised. It does not show the ultimate ownership of these yards, and whether there is any connection of the [fol. 623] type I have been talking about. I make no request and I am not pressing the objection.

Exam. Carter: Mr. Gladson, would you be willing to furnish for the record, or advise us and let us know whether Mr. Prince owns any stock in any operating railroad?

Mr. Gladson: I will undertake to get that information.

Mr. Fulbright: It is not a question of what stock he owns, but interest, either direct or indirect.

Exam. Carter: I mean whether he owns a substantial interest.

Mr. Fulbright: Mr. Examiner, I take it what counsel has in mind is whether the ultimate owner of this stock, Mr. Prince, owns or controls a controlling interest in any of the trunk lines serving Chicago. That is really what counsel has in mind, I take it, and on that, of course, we would have to base an opinion.

Mr. Smith: I don't think it makes a straw's difference——

Mr. Fulbright: Well, if it makes a straw's difference, we will undertake to do it.

Exam. Carter: Now, I had one more question along the same line I was asking before.

Mr. Gladson: Mr. Examiner, may I be perfectly clear as to what the Examiner wants me to furnish in respect to Mr. Prince's ownership of stock?

Exam. Carter: I will tell you what I would rather have, [fol. 624] if you are willing to furnish it, I would rather have, or I would like to have, the extent of Mr. Prince's ownership in any operating railroad's stock. The extent of his ownership in any operating railroad. If you are not willing to furnish that, perhaps as Mr. Fulbright suggested, you might show us what railroads he controls, if he does control any, through stock ownership.

Mr. Gladson: I will see what I can develop.

Exam. Carter: As to these tariffs that you have filed recently, within the last year or two, with the Secretary of Agriculture, containing this $3.00 charge, was the service covered by that charge rendered by the Stock Yards Company prior to the publication of the charge?

The Witness: Mr. Examiner, if I may be permitted to again discuss for a moment the general nature of all our charges, I think——

By Exam. Carter:

Q. I mean, let us get down to that specific case. I imagine you can answer that. Did you perform the service covered by that charge prior to this publication?

A. In connection with our handling of livestock through the yards from the time it was received until it leaves the yards we performed services and furnished facilities just the same as a hotel does——

Q. Well, now, let us get down to the question. I mean, [fol. 625] are the services you now perform in connection with your yardage charges, that is, the $3.00 charge, and the other yardage charges, are they the same now as the services you performed prior to the publication of the $3.00 charge?

A. The services themselves are the same, approximately, depending on the different services or facilities that are required for the different shipments.

Q. And you have increased what I might term your normal yardage charge as distinguished from the $3.00 charge, you have increased that a couple of times in the last two or three years, is that correct?

A. Yes.

Q. And in addition to that, you have imposed a separate charge of $3.00, is that correct?

A. That is correct, and we need them all.

Q. I am not criticizing it. And those various charges that you now have, are they exactly the same services that you performed prior to the publication of this $3.00 charge? Is that correct?

A. The services as a whole are the same. The distribution of those services between the $3.00 charge, the yardage charge, and the loading and unloading charge is what we have been attempting to solve for the last two or three years, both before the Commission and before the Secretary of Agriculture.

Exam. Carter: I think that is all I have right now. I [fol. 626] may think of something tomorrow.

Redirect examination.

By Mr. Gladson:

Q. Mr. Henkle, I believe that in response to one of the Examiner's questions you said that you had advanced

charges or freight charges on outbound shipments. What did you mean by that?

A. That statement would not be clear, but what I intended to say was that if there are advance charges or follow charges, they are placed on the waybills by the District Agency and follow the livestock. I believe that is a better statement.

Q. On the outbound shipments, in the event they are collect shipments, the freight charges are collected at destination, are they not?

A. Yes, sir.

Q. And in the event that they are prepaid shipments to whom does the shipper pay the charges?

A. I could not say specifically without referring to the records, but if the shipment is to be prepaid then the shipper must make arrangements to prepay it before the stock leaves the Yard, and he would have to do, it seems to me, some work in advance with both the Stock Yards District Agency and ourselves in arranging that.

Q. Now, I have in mind the freight charges as distinguished from the follow charges, or the charges of the Yard Company in the case of prepaid shipments; do you [fol. 627] know at this time whether they would be paid by the shipper direct to the Stock Yards Agency of the railroads or advanced by the Stock Yards Company? If you do not know I am going to ask you to ascertain that fact, Mr. Henkle.

A. I think it would be better to ascertain it definitely so that my answer will be correct about that specific detail.

Q. In the event the shipper wants to ship out a load of cattle or other animals, what is the first step that he takes toward getting those animals out of the yard?

A. He files an order with us stating, please deliver the livestock in a specific pen to a specific railroad.

Q. What else does he do, if anything?

A. He first orders his car from the District Agency.

Q. That is before he gives you the order?

A. Yes, usually, so that he may have his car on hand when it is time to ship.

Mr. Gladson: That is all.

Exam. Carter: Any other question?

(No response.)

Exam. Carter: You are excused.

(Witness excused.)

Exam. Carter: Will you have another witness? Is Mr. Heinemann here? If not, we will adjourn until tomorrow morning——

Mr. Walter: Before you adjourn, I would like to make a little statement, because I find I cannot be here tomorrow. [fol. 628] On May 27th the B. & O., Big Four, Nickel Plate and Pennsylvania filed a complaint against the St. Louis National Stock Yards Company, and the East St. Louis Junction Railroad Company, which brings into issue a set of facts that may be very much like those involved in this case, and that exist at other places, and I wanted to call your attention to this case, with the thought that before this present I. & S. case is decided, that the facts will be developed in that St. Louis docket at St. Louis, so that the decision in this case may not foreclose or lay down a principle that would interfere with the consideration of the facts as they exist at St. Louis. 27737 is the docket number.

Also, the St. Louis National Stock Yards Company controls and owns in so far as in a practical sense is concerned, the East St. Louis Junction Railroad Company, and that railroad company in its tariff filed with the Interstate Commerce Commission, carries an item of $1.25 as to single deck loads and $1.50 for double deck loads, for loading and unloading. The Stock Yards Company filed no tariff with the Interstate Commerce Commission.

The complaint is made against the loading and unloading charge, and inasmuch as I may not be able to be here tomorrow I wanted to call your attention to that situation, where the loading and unloading is performed by that Stock Yards [fol. 629] Company with its own facilities and with its own services.

Mr. Smith: I object to that, if it purports to be a statement of fact, on the ground that it is not submitted in the proper manner; I object to it as wholly immaterial; and I ask that counsel state what relief he is seeking in this proceeding, what he wants the Commission to do about the situation he is talking about.

Mr. Walter: Why, I just do not want the Commission in this case to lay down a rule which would jeopardize the cases at other points, without having the facts before them

relating to those particular cases. I do not want a decision here that would interfere with the full consideration of the facts and the law at St. Louis, when it has nothing in the record dealing with them.

Exam. Carter: As I see it, your request is that the Commission do not decide the I. & S. case until they have heard the facts in your case, is that it?

Mr. Walter; If I can get the complainants to move promptly. I represent the defendants and may not be able to get a prompt hearing, but I do want to get the facts with the Commission before they decide this case. Certainly, I do not want them to lay down a principle in this case that will foreclose our presenting the facts and the law on the situation at that point.

Mr. Smith: Is this it, that you do not want a decision [fol. 630] here as to whether the Union Stock Yard & Transit Company at Chicago is a common carrier until the Commission has determined the quantum of the charges to be made at St. Louis?

Mr. Walter: Oh, no.

Mr. Smith: Is that right?

Mr. Walter: No, no.

Mr. Smith: All right. I move to strike all that statement from the record as immaterial.

Exam. Carter: I will note your request, Mr. Walter. That is all I can do.

Mr. Walter: That is all you can do. This is one thing I had in mind in making the statement, it might be that the complainants in Docket 27737 will promptly go to hearing, and then I should ask to have it set down for hearing in this case, if it did not prolong this I. & S. proceeding.

Mr. Smith: Are we to understand that none of those statements is to be taken as a statement of facts in this record?

Mr. Walter: The only fact is that I have made the statement.

Exam. Carter: That is a statement of counsel and may not necessarily be a statement of fact.

We will adjourn until tomorrow morning at ten o'clock.

(At 4:25 o'clock P. M. (D. S. T.) June 10, 1937, an adjournment was taken until June 11, 1937, at 10 o'clock A. M. (D. S. T.).

[fol. 631] Chicago, Illinois, June 11, 1937.

Before: Paul O. Carter, Examiner.

Hearing resumed at 10 o'clock A. M. (D. S. T.)

Appearances: As heretofore noted.

Proceedings

Exam. Carter: Yesterday in respect of the information to be obtained as to the holdings of Mr. Prince, I indicated that the Commission would like to have, that is, if Mr. Prince is willing to furnish it, first, the holdings of Mr. Prince in any operating railroad serving Chicago; and, if he is unwilling to furnish that, then his holdings in any railroad which he might control.

Now, I want to say that the Commission would much prefer to have Mr. Prince's holdings of all kinds in any operating railroad serving Chicago.

Mr. Smith: Mr. Carter, may I ask, are you leaving it to the opinion of Mr. Prince as to whether or not he does control?

Exam. Carter: My recommendation to the Commission will be if the information submitted is not satisfactory, to have the Commission make an investigation of its own.

Mr. Gladson: You requested of us yesterday, Mr. Examiner, Mr. Prince's holdings. We have ascertained that fact, and Mr. Prince's holdings are 500 shares of common stock [fol. 632] of the Pere Marquette, which is much less than control. That is his sole holdings of railroad stock.

Mr. Smith: Does that represent, Mr. Gladson, his entire interest, both directly and indirectly through any intermediary or nominee or trustee?

Mr. Fulbright: Do you mean through a nominee he owns?

Mr. Gladson: I understand that is his sole interest in railroads.

Exam. Carter: Does that include his holdings of bonds?

Mr. Gladson: Mr. Examiner, I understand that that is the only interest Mr. Prince has as far as stocks are concerned. Now, whether that covers bonds or not, I am unable to ascertain at this time.

Exam. Carter: Will you find out if he is willing to disclose that, and if he is, will you file that within ten days?

Mr. Gladson: Yes, sir, I will be glad to do that.

Now, I also stated on the record yesterday that as far as the Maine Company is concerned, that is the Chicago Stock Yards Company, the Maine corporation, the only interest——

Exam. Carter: That is the M-a-i-n-e Company, is it?

Mr. Gladson: That is right. The only interest that it had in railroads was 22 shares of a small subsidiary of the New Haven, which was less than control.

Exam. Carter: Mr. Henkle, there is just one little point that is not very important, but I want to clear it up. Will [fol. 633] you resume the stand, please.

O. T. Henkle, previously sworn, was recalled and testified further as follows:

Direct examination.

By Exam. Carter:

Q. As I understand it, the railroads maintain a Joint Agency at the Stock Yards?

A. Yes, sir.

Q. That is maintained simply by the trunk line railroads and not by the Stock Yards? The Stock Yards Company does not join in the maintenance of that Joint Agency, do they?

A. They do not.

Mr. Smith: I have one question, please.

Cross-examination.

By Mr. Smith:

Q. The Union Stock Yard Company has been engaged in operating a hotel since its inception, has it?

A. Yes, sir.

Q. And that has been continuous down to date?

A. Yes, sir.

Mr. Smith: That is all.

(Witness excused.)

Exam. Carter: Respondents may proceed.

Mr. Gladson: I will call Mr. Heinemann.

C. B. HEINEMANN was sworn and testified as follows:

Direct examination.

[fol. 634] By Mr. Gladson:

Q. Will you give your name to the reporter, please, Mr. Heinemann?

A. C. B. Heinemann.

Q. Where do you live, Mr. Heinemann?

A. 9547 Longwood Drive, Chicago, Illinois.

Q. What is your occupation?

A. I am employed by the Union Stock Yard & Transit Company; also I am secretary of the American Stock Yard Association, National Group; Secretary, National Stockyards Association, Midwestern Group.

Q. Will you proceed in your own way and state your qualifications to testify as to the matters involved in this case?

A. I have been employed in various positions since 1903 which required me to be in close and constant touch with stockyard matters and with rates and tariffs pertaining to livestock traffic throughout the country.

In October, 1903, I was sent to the St. Louis National Stock Yards by the present Nickel Plate Railroad to serve under their livestock agent at that point. I held this position until September 26, 1904, when I entered the employ of Nelson Morris & Company—later to become Morris & Company. The position was in their local traffic department handling rates, routing, claims, and the usual detail handled in industrial traffic departments. Mr. Nelson Morris and his son, Edward Morris, were, at that time, the dominant stockholders in the St. Louis National Stock [fol. 635] Yards, and their traffic department in which I was employed, was required to keep in close touch with stockyard matters so as to be sure that the stockyards was maintained on a competitive basis with other yards so far as railroad and traffic matters were concerned. While at East St. Louis I became thoroughly familiar with the stockyards and railroad operations at the yards.

Mr. Smith: Incidentally, have you a copy of that statement you are reading from?

Mr. Gladson: You can give Mr. Smith a copy, can you?

The Witness: No, I only have three copies, my own, one for you and one for the stenographer.

Mr. Gladson: Proceed.

The Witness: In March, 1907, I was transferred to the general office of Morris & Company at the Union Stock Yards, Chicago, where I was also located in the traffic department, handling similar work, but with a much wider field. My superior officer was Mr. H. L. Wyatt, general traffic manager. Mr. Wyatt was later succeeded by Mr. E. F. Bisbee. Mr. Wyatt was transferred to St. Louis National Stock Yards as traffic manager of that company and remained in that capacity until he retired. Mr. Bisbee remained my superior officer until 1910, when he was placed in charge of the construction of the Oklahoma National Stock Yards and the Oklahoma City Junction Railway. These properties were constructed beginning in 1909, and [fol. 636] at the same time Morris & Company constructed their Oklahoma City packing house.

From the time arrangements were made for the construction of these properties at Oklahoma City I was in charge of working out plans for the handling of the material and supplies for the sub-structures and superstructures of the properties under construction.

There was also assigned to me the work of getting the necessary tariffs lined up so that the Stockyard Company, the Oklahoma City Junction Railway Company, and Morris & Company's Oklahoma City packing house would be in a position to compete with the markets such as Wichita, on the north, and Fort Worth, on the south.

Mr. Bisbee was succeeded by Mr. A. W. MacLaren, and Mr. Bisbee became the vice president and general manager of the Oklahoma National Stock Yards Company and the Oklahoma City Junction Railway Company. He remained in this position until he was transferred to the St. Louis National Stock Yards as vice president and general manager of that property, which then included both stockyard and railroad properties under one corporation. I remained in charge of the work pertaining to the Oklahoma City rate adjustment throughout the period of construction, and during the long period of litigation before the Interstate Commerce Commission, the final result of which was the establishment of the Southwestern Mileage Scale applying on [fol. 637] live stock and the products thereof, reported in 22 I. C. C. 160, and 23 I. C. C. 656, decided in 1910-1911. After the formal opening of the stock yards I was assigned by Mr. MacLaren to the duty of cooperating with the Oklahoma City Junction Railway in the matter of preparing and

filing their annual reports and handling general traffic negotiations.

At this time the Morris interests were the largest buyers and shippers of live stock in the world. They operated a ranch of over one and a quarter million acres in Chihuahua, Mexico; another ranch of slightly less than a million acres near Midland, Texas; another near Herman, Nebraska; and leased several hundred thousand acres of reservation land near Morristown, South Dakota. They also operated extensive feeding plants at practically all of the large distilling centers, such as Peoria and Pekin, Illinois, and at numerous points in Kentucky.

They had extensive buying operations at practically every live stock market in the middle west, and in the more important live stock producing areas, such as the Shenandoah Valley of Virginia, and in several of the Canadian Provinces.

They bought and shipped from nearly all of the large live stock markets in the United States, and exported thousands of cars of live stock every year.

The handling of this traffic was all under the jurisdiction of the traffic department, which had charge of the routing, [fol. 638] rating, payment of charges, steamship bookings, claim matters, and all other transportation matters affecting this live stock handling. Our duties were much broader than those of the ordinary traffic department. The general supervision of all this traffic was handled by me from the Chicago office, and this, perforce, necessitated frequent trips which I made to various strategic markets and shipping points for the purpose of acquainting myself with the conditions under which the traffic must be handled. In this position I became familiar with the stock yards and the operation of the railroads connected therewith at practically all the important markets in the country.

I was appointed assistant traffic manager of Morris & Company in 1910, and remained in that position under Mr. MacLaren until 1916. In connection with my duties I might mention that I compiled and took to Washington the first tariff filed by the Kansas City Stock Yards Company, which was the subject of the litigation resulting in the decision of the Commission, reported in 33 I. C. C. 92. I also compiled and took to Washington the first tariff published by the St. Louis National Stock Yards, while both the railroad and stockyard property of that company was operated by a single corporation.

The Morris interests controlled the St. Louis National Stock Yards; the Kansas City Stock Yards Company; the Oklahoma National Stock Yards Company, and the stock yards at El Paso, New Orleans and New York City. They [fol. 639] were also interested in the stock yards at Philadelphia, Brighton, Massachusetts, and Baltimore.

Through their interest in the National Packing Company, the Morris people were interested in the stockyard companies in which the National Packing Company held substantial stock interests, namely: St. Joseph, Missouri; Omaha, Nebraska; Milwaukee, Wisconsin; the Western Meat Company plant at South San Francisco, California; and also the Denver stock yards.

In the course of my work in the traffic department of Morris & Company, I frequently visited these yards in which the Morris interests held either a dominant or minority interest as well as those in which they had an indirect interest. I also frequently visited and observed conditions at competing yards throughout the country to observe conditions and operations at those markets, so as to satisfy myself that they did not enjoy advantages not accorded to the yards in which we were interested, and also to make sure that our own operations were equally as efficient as those of competing yards. I became acquainted with practically every stockyard operator in the country and frequently conferred with various of these men in regard to stock yards problems. During the lifetime of Mr. Nelson Morris I frequently investigated special stock yards matters for him personally.

In July, 1916, I left Morris & Company to bcome secretary of the National Live Stock Exchange, which then, as [fol. 640] now, was the national trade association of the live stock exchanges on twenty-eight of the principal markets of the United States with headquarters at the Union Stock Yards in Chicago, Illinois.

I remained with the Exchange, with the exception of time spent with the Railroad Administration in Washington, D. C., until July, 1920. As a part of my duties with the Exchange I made frequent visits to all of the member markets which, as I have stated, comprised all of the principal markets in the United States. On the occasion of these visits I observed conditions at these markets and discussed with the local exchange members all problems pertaining to

the handling of live stock at their particular market. These observations covered market practices, as well as stockyard operations.

As a necessary part of my work I became still more familiar with the physical properties of the stockyard companies at each of these markets and the railroad facilities serving them, as well as the inter-corporate relationship between the stockyard companies and the railroads serving them, where any existed.

While I was with the Exchange they were requested to give me leave of absence for service with the Railroad Administration. The request was granted, and I went to Washington as traffic assistant to Director Prouty, in what was then the Division of Public Service and Accounting. This division was later divided into two divisions, one known as the [fol. 641] Division of Public Service, and the other the Division of Accounting. I remained with the Division of Public Service under Director Max Thelen. At that time, a plan was worked out whereby the Division of Public Service, working in conjunction with the Division of Traffic, was required to pass upon every requested rate authority covering freight, passenger, baggage and express charges. A special live stock committee operating under the chairmanship of Mr. J. L. Harris was designated to work out uniform rules and regulations for the handling of live stock traffic. My director assigned to me the duty of working with that committee, which undertook to, and did, submit a complete set of uniform rules and regulations applying to live stock traffic throughout the United States.

These rules and regulations represented the joint efforts of the two divisions and when finally approved for publication became effective while the railroads were still under federal control. With some few exceptions these rules and regulations remain effective in the carriers' tariffs today.

I left the National Live Stock Exchange in 1920 to become executive secretary of the Institute of American Meat Packers, the national trade association of the meat packing industry and successor to the American Meat Packers' Association. The Institute had a membership which included all of the large and medium-sized packers throughout the United States. Most of these were located in cities where [fol. 642] public stock yards were in operation.

As part of my duties with the Institute, I visited these members to discuss with them their local problems and to

observe the conditions under which they operated. These observations covered not only the receipt and handling of their live stock, but also market practices and stockyard operations at public markets through which their supply was received.

In 1921 I was made executive vice president of the Institute and remained with them in that capacity until December, 1923. During the period I was with the Institute I visited every public stock yards which was then or later posted by the Secretary of Agriculture under the Packers and Stock Yards Act, 1921. While with the Institute I gathered data on live stock markets and their historical development for Dr. Clemens, who was preparing to publish his book on the live stock and meat industry. His book refers to my work in cooperation with him. That book is the American Meat and Live Stock Industry by Rudolph Alexander Clemens. As executive vice president I was in reality in executive charge of the Institute.

In December, 1923, I went to Atlanta, Georgia, to assist in the organization and initial development of the Atlanta Union Stock Yards, Inc. I served as vice president and general manager of that company from December, 1923, until December 31, 1924.

On January 1, 1925, I went with the Kennett-Murray Com- [fol. 643] panies as manager of their service. They were, and are, the largest live stock buying organization in the world, and were vitally interested in the service which they received at the various yards. Their operations required the maintenance of offices on approximately fifty large and small live stock markets. I was required to visit each of these offices frequently. There I conferred with the local managers, observing their operations as well as the operations of the various stockyard companies, and comparing yard operations as I found them. I was also required to call upon their packer patrons located in various states of the Union. There I was given an opportunity to and did check conditions and observe operations, especially where the live stock, which we had purchased for them moved through public stock yards adjacent to their plants.

In April, 1932, I left Kennett-Murray to enter the employ of the Kansas City Stock Yards Company at the request of its president, Mr. George R. Collett, with whom I had worked while with Morris & Company. I was given the title of traffic manager of the Kansas City Stock Yards

Company and the Kansas City Connecting Railroad Company, both companies having common officers and offices, the former controlling all of the stock of the latter. In connection with my duties at Kansas City, I was also called to handle, with Mr. Collett, matters pertaining to the St. Louis National Stock Yards and its wholly-owned subsidiary, the East St. Louis Junction Railroad Company, as [fol. 644] he was president of both those companies, as well as president of the Stock Yards Company and the Connecting Railroad Company at Kansas City.

In the period of my employment at Kansas City I also worked with Mr. Collett in connection with the affairs of the Oklahoma National Stock Yards Company, and the affiliated company, the Oklahoma City Junction Railway Company. Both of these companies were then, as now, controlled through stock ownership by the Morris Estate, whose trustees had designated Mr. Collett to look after the interests of that estate in the Oklahoma City properties and to exercise general supervision over their corporate affairs.

I remained with the Kansas City Stock Yards Company and the Kansas City Connecting Railroad Company until May, 1933, at which time the American Stock Yards Association was organized upon a national scale.

The reason for its expansion at that time was the necessity of having the central organization to deal with the N. R. A. authorities in connection with the President's reemployment agreement and the proposed code of fair competition. The Association requested Mr. Collett to permit me to serve as its secretary with headquarters in Washington. This request was granted.

I have been secretary of the Association since May, 1933. During the period, May, 1933, to April 2, 1935, I handled [fol. 645] Association matters exclusively and was in active charge of its affairs. In our efforts to work out a code that could be adopted for all of the stock yards, it became necessary for me to gather much additional information concerning their operations, corporate structures, service problems, labor matters, and nearly every other phase of stock yards' activity and to compare these one with the other to the end that a workable code might be evolved. This information was gathered in various ways,—by questionnaires, by conferences, by personal visits to the stock yards, and in other ways.

The membership of the American Stockyards Association as it was constituted during the N. R. A. days, and as it now exists, includes all of the large stock yards in the country and most of the important small yards. As a matter of fact, the volume of live stock handled through the member yards represents over 90 per cent of all the live stock marketed through the posted public stock yards of the United States.

Under the Packers and Stock Yards Act, 1921, the Secretary of Agriculture posts for regulation under the Act all stock yards which meet the requirements as to size and operation. From time to time the Secretary of Agriculture lists the stockyards which have been posted, giving the name of the stock yards, the name of the owner or operator of it, the city in which it is located, and the date the stock yards company was posted. I have obtained the latest revised list [fol. 646] of posted stock yards, this list being as of February 1, 1937.

Mr. Smith: Mr. Gladson, I am unable to connect with the statement of your witness' qualifications the dissertation that he is now giving with reference to the terms of the Packers and Stock Yards Act, and I wish you would indicate, please, by questions or otherwise, when the witness has completed the statement of his qualifications that you have asked him to state.

Mr. Gladson: Well, if you are unable to determine that fact, I will be glad to enlighten you.

Mr. Smith: I cannot determine it because I am not clear as to the connection between the postings of the Packers and Stock Yards Act and the qualification of this witness, and on that point I would like to know what he is testifying about now.

Mr. Gladson: He stated that the American Stock Yards Association had as members practically all of the stock yards which were posted by the Secretary of Agriculture.

Mr. Smith: He is still dealing strictly with his qualifications, is he?

Mr. Gladson: He is, up to this point.

Mr. Smith: All right.

The Witness: I now offer for identification an exhibit which I ask to be marked Respondent's Exhibit for identification.

Examiner Carter: What is this exhibit?

[fol. 647] Mr. Smith: Has this anything to do with the witness' qualifications?

Mr. Gladson: Yes, it has to do with the witness' qualifications. It is not however, limited to that subject.

Exam. Carter: Suppose the witness tells his qualifications first.

Mr. Gladson: This is part of his qualifications, Mr. Examiner.

Mr. Smith: You want to offer some exhibits in connection with the establishment of this witness' qualifications?

Mr. Gladson: I am going to offer two exhibits that have to do with this witness' qualifications, and also that have to do with other phases than his qualifications.

Mr. Smith: I object to the offer of the exhibit.

Mr. Gladson: I have not offered the exhibit yet.

Mr. Smith (Continuing): In connection with any statement of the witness' qualifications.

Mr. Gladson: Mr. Examiner, I will ask that that document which is the last revised list of posted stock yards in the United States, mentioned by the witness, be marked as Respondents Exhibit——

Mr. Smith: I object to any identification mark, or any other identification number being given in this record.

Exam. Carter: I sustain the objection.

Mr. Gladson: Just a moment, Mr. Examiner, we are not [fol. 648] offering——

Mr. Smith: You are not offering any exhibit?

Exam. Carter: You are offering it for identification, are you not?

Mr. Gladson: I asked that it be marked for identification.

Exam. Carter: I sustain the objection.

Mr. Gladson: Now, just a minute, Mr. Examiner, I have already shown that this exhibit in part helps to show the qualifications of this witness. Now, whatever you may think about its further use it certainly is proper for that purpose.

By Mr. Gladson:

A. Let me ask you, Mr. Heinemann, does this exhibit which I have just asked be marked for identification show the members of the National Live Stock Association——

A. Of the American Stock Yards Association.

Q. — of the American Stock Yards Association?

A. It does, by red mark designation.

Mr. Smith: I want to object further, Mr. Examiner, on the ground that it is not relevant or pertinent to the qualifications of this witness for testimony with reference to the issue presented in this proceeding, for him to make any showing with reference to his knowledge of conditions that may or may not be obtaining at other stock yards than Chicago, throughout the United States.

Mr. Gladson: I wonder how Mr. Smith knows that, with-
[fol. 649] out knowing what he is going to testify to?

Mr. Smith: I may know it officially for this reason, that Mr. Henkle in his testimony that he gave at the initial hearing stated as part of the text of the manuscript that he read, what Mr. Heinemann was going to testify about these other yards, and Mr. Shaw said at that time that he was willing to have the question of the admissibility of this evidence determined at that moment in connection with the admissibility of that statement of Mr. Henkle's testimony, and so we debated it, and the Commissioner who was sitting ruled upon it and excluded it. He ruled both upon the submission of the testimony and he ruled upon objection made to the offer of proof.

Mr. Fulbright: Mr. Examiner, I wish to dissent to the statement of counsel. I have read that record very carefully, and I am sure the Examiner is familiar with it, and counsel has gone beyond what is now before us, and at an appropriate time I wish to show that the record absolutely shows there was no ruling made upon the admissibility of the evidence. There was the ruling made upon the form of an offer of proof, but here we have merely offered for identification an exhibit, it is not yet offered in evidence, and I know of nothing in the rules of the Commission that would prevent a party to a proceeding from offering for identification an exhibit. When it is offered in evidence is the appropriate time to discuss its admissibility.

Mr. Gladson: I also call the Examiner's attention to the
[fol. 650] fact that regardless of what further use we want to make of this exhibit, it certainly is competent for one purpose at least, to show the witness' qualifications. His testimony will cover the operations at other yards, but he is also going to testify as to the situation at Chicago. Now, the experience which he gained at other yards certainly will be of value to him in testifying to the situation at Chicago, and I cannot conceive of any tribunal that would not let us, under those circumstances, mark an exhibit for

identification. It may be later on there will be a question about its admission, but all we are asking at this time is that it be marked for identification.

Exam. Carter: You state that the companies marked in red are members of your association?

The Witness: Yes, sir.

Exam. Carter: If you want to present the names of those companies in a separate exhibit, I will receive that in evidence.

I adhere to my ruling as to this exhibit which you have asked be marked for identification; I will not permit it to be marked for identification.

Mr. Gladson: On what theory?

Exam. Carter: My ruling.

Mr. Gladson: I have not heard any objection, or any valid objection to this exhibit from counsel. I want to note an exception to the arbitrary ruling of the Examiner.

[fol. 651] Exam. Carter: Note an exception, Mr. Reporter.

I might say this, gentlemen, at this time; the evidence relating to practices at other stock yards is not considered relevant or material in this proceeding, and that is really the basis for my ruling.

Mr. Gladson: Now, is that a ruling in advance of any offer of testimony, or any reason that we might give for proof of that character?

Exam. Carter; That is a ruling at this time on the general proposition. On the specific testimony that is offered, I will rule when it is offered. You asked me to give an explanation for my ruling at this time, and I make that explanation, in view of what transpired at the former hearing, where Mr. Shaw very plainly disclosed that it was his purpose to introduce testimony relating to practices at other stock yards.

Mr. Gladson: Mr. Examiner, the only thing that I ask to be done is that at this time it be marked for identification.

Exam. Carter: I might make this general observation, that I am not going to allow to be marked for identification any evidence that I consider to be irrelevant and immaterial.

Mr. Fulbright: Mr. Examiner, may I ask that the Examiner give ears to the arguments of counsel as to the testimony when it is offered with respect to the other yards?

Exam. Carter: Yes.

Mr. Fulbright: It is not in the record. It has been only [fol. 652] briefly discussed.

Exam. Carter: Yes, I did not mean, Mr. Fulbright, when I tried to give Mr. Gladson a reason for my ruling,—I did not mean by that that I am ruling on all offered testimony.

Mr. Fulbright: Thank you.

Exam. Carter: I wanted to give you an idea beforehand of my position.

Mr. Gladson: Mr. Heinemann, will you please read into the record the names of the members of the American Stock Yards Association?

A. Union Stock Yards Co. of Baltimore, Maryland; Brighton Stock Yards Co., a part of Boston, Mass.; New York Central Railroad Co. Stock Yards, under the trade name of Buffalo Stock Yards, Buffalo, New York; Bushnell Stock Yards Co., Inc., Bushnell, Illinois; Foust-Yarnell Stock Yards, Chattanooga, Tennessee; Union Stock Yard & Transit Co. of Chicago, Chicago, Illinois; Cincinnati Union Stock Yard Co., Cincinnati, Ohio; Cleveland Union Stock Yards Co., Cleveland, Ohio; Union Stock Yards Co., Dayton, Ohio; Denver Union Stock Yard Co., Denver, Colorado; Michigan Central Railroad Co., Union Stock Yards, operated under the trade name of the Detroit Stock Yards, Detroit, Michigan; Evansville Union Stock Yard Co., Inc., Evansville [fol. 653] Indiana; Fort Wayne Union Stock Yards, Co., Inc., Fort Wayne, Indiana; Fort Worth Stock Yards Co., Fort Worth, Texas; Port City Stock Yards Co., Houston, Texas; Belt Railroad Stock Yards Co., operating under the trade name of Union Stock Yards Co., Indianapolis, Indiana; National Stock Yards, Jacksonville, Florida; Jersey City Stock Yards Co., Jersey City, New Jersey; Joplin Stockyards, Inc., Joplin, Missouri; Kansas City Stock Yards Co., Kansas City, Missouri; Newark Stock Yards, Kearny, New Jersey, a part of Newark; Union Live Stock Yards Co., Inc., Knoxville, Tennessee; Lafayette Union Stock Yards Co., Lafayette, Indiana; Union Stock Yards Co., Lancaster, Pennsylvania; Gentry-Thompson Stock Yards Co., Inc., Lexington, Kentucky; Lexington Live Stock Commission Co., Inc., Lexington, Kentucky; Los Angeles Union Stock Yards Co., Los Angeles, California; Bourbon Stock Yards Co., Louisville, Kentucky; Milwaukee Stock Yards Co., Milwaukee, Wisconsin; Union Stock Yards Co., of Montgomery, Inc., Montgomery, Alabama; Nashville

Union Stock Yards, Inc., Nashville, Tennessee; St. Louis National Stock Yards, National Stock Yards, Illinois; New [fol. 654] Orleans Stock Yards, Inc., New Orleans, Louisiana; Postoffice, Arabi, Louisiana; Union Stock Yards & Market Co., Inc., New York, New York; Portland Union Stock Yards Co., North Portland, Oregon; Salt Lake Union Stock Yards, North Salt Lake, Utah; Union Stock Yards, Ogden, Utah; Oklahoma National Stock Yards Co., Oklahoma City, Oklahoma; Union Stock Yards Co., of Omaha, Ltd., Omaha, Nebraska; Parsons Stock Yards Co., Inc., Parsons, Kansas; Peoria Union Stock Yards Co., Inc., Peoria, Illinois; West Philadelphia Stock Yards Co., operating under the trade name of Pennsylvania Stock Yards, Philadelphia, Pennsylvania; Pittsburgh Joint Stock Yards Co., Pittsburgh, Pennsylvania; Union Stock Yards, San Antonio, San Antonio, Texas; Union Stock Yards Co. of Seattle, Seattle, Washington; Sioux City Stock Yards Co., Sioux City, Iowa; Sioux Falls Stock Yards Co., Sioux Falls, South Dakota; South San Francisco Union Stock Yards Co., South San Francisco, California; St. Joseph Stock Yards Co., South St. Joseph, Missouri; St. Paul Union Stockyards Co., South St. Paul, Minnesota; Old Union Stockyards Co., Spokane, Washington; Missouri Farmers Association Stockyards Co., Springfield, Missouri; Union Stock Yards Co., [fol. 655] Springfield, Missouri; Mississippi Valley Stock Yards Co., Inc., St. Louis, Missouri; Wood County Live Stock Co., operated as Interstate Stock Yards, Toledo, Ohio; Toledo Union Stock Yards Co., Toledo, Ohio; Union Stockyards Co. of Fargo, West Fargo, North Dakota; Wichita Union Stock Yards Co., Wichita, Kansas.

Exam. Carter: As I understand it, those are the members of your association?

The Witness: Yes, sir.

Exam. Carter: And the name of the association is what?

The Witness: American Stock Yards Association.

By Mr. Gladson:

Q. Will you proceed, Mr. Heinemann.

A. The Bureau of Agriculture Economics——

Mr. Smith: Just a moment. I think that in view of the situation that exists here I shall have to ask that this testimony be elicited from the witness by questions, so that counsel may have some apprehension of what evidence is designed to be produced for the record.

Exam. Carter: Just a minute, gentlemen. I suggest that you offer a copy of that to Mr. Smith and we will take a recess and let Mr. Smith see what this written testimony is going to be, so he will know what to do. I mean, some of the testimony that has already gone in is in my opinion im-[fol. 656] material and irrelevant and does not go to the qualifications of this witness. So I do not imagine you have any objection to letting Mr. Smith see what Mr. Heinemann has written here, or do you prefer to address your questions to him and have him make those answers?

By Mr. Gladson:

Q. Mr. Heinemann, how many members of the association to which you have referred were posted stock yards?

A. All of them.

Q. And do you remember the total number?

A. Currently, I believe, about 52, Mr. Gladson.

Q. And what have you to say as to the volume of business handled by those stock yards?

Mr. Smith: That is objected to as immaterial.

Mr. Gladson: I think that is a proper question.

Exam. Carter: I will allow him to answer that question.

The Witness: They handle over 95 per cent of the public market live stock in the United States.

Mr. Gladson:

Q. And have you an exhibit which shows the amount of live stock handled by these members of that association?

Mr. Smith: Objected to as immaterial, whether he does or not, because the exhibit would be immaterial and incompetent.

Mr. Gladson: Oh, that is a perfectly proper question.

Exam. Carter: You may answer whether you have such an exhibit.

The Witness: I do have an exhibit, which does not include [fol. 657] those exclusively, but includes those with all other reporting stock yards.

By Mr. Gladson:

Q. By whom are these statistics, embodied in that exhibit, gathered?

A. By the Bureau of Agricultural Economics of the United States Department of Agriculture from reports made to the Bureau by the reporting yards listed thereon.

Q. And what years does this exhibit cover?

A. 1935 and 1936.

Q. And have you marked on the exhibit or indicated on the exhibit the members of the American Stock Yards Association?

A. They have not been marked, Mr. Gladson, but they can be readily identified by the list I have just read.

Q. And was that exhibit prepared under your supervision?

A. This exhibit is the official report of the B. A. E., so that it was compiled by them and obtained by me from them.

Q. Will you produce it, please?

(The document referred to was passed to Mr. Gladson.)

Mr. Gladson: I will ask that the document to which the witness has just referred, be marked as Respondent's Exhibit for identification.

Mr. Smith: I object to the second request that that be done, as I did to the first, for the same reasons.

Exam. Carter: I will allow you to put in the data with respect to Chicago, if you want to. Otherwise, I will sustain [fol. 658] the objection.

Mr. Gladson: I want to preserve an exception.

Exam. Carter: Note an exception, Mr. Reporter.

By Mr. Gladson:

Q. When did you close the American Stock Yards Association offices at Washington?

A. We closed that office April 2nd, 1935.

Q. What brought about the closing of that office?

A. The invalidating of the National Industrial Recovery Act, which made no further action upon our code necessary.

Q. Are you still an officer of that association?

A. I still remain secretary of the association, but our offices were moved to Chicago.

Q. And where did you go on or immediately before April 2nd, 1935?

A. To the Union Stock Yards at Chicago.

Q. Have you since coming with the Stock Yards Company at Chicago had occasion to visit any of the principal stock yards of the country?

A. I have, yes, sir. I have visited approximately twenty of them since I came here in April, 1935.

Q. And what if anything did you observe or do while at these stock yards?

Mr. Smith: That is objected to as immaterial.

Exam. Carter: I sustain the objection, and note an exception.

[fol. 659] Mr. Gladson: I want an exception to that ruling, and I offer to prove by this witness that in visiting these stock yards he observed their operations and inspected their facilities.

Mr. Smith: Same objection to the offer.

Exam. Carter: Strike the offer.

Mr. Gladson: Just a moment, Mr. Examiner. Under what theory am I not allowed, in a proceeding of this kind, to make an offer of proof?

Exam. Carter: We consider it immaterial and irrelevant and we are not going to have that offer of proof in detail. Now, if you want to make your *general observations* as to what you intend to prove by this witness, I will rule on those, but we are not going to have submitted here detailed offers of proof in the nature of the details of the evidence which the witness is intending to give.

Mr. Gladson: I certainly want to preserve an exception to that. I know of no way of making an offer of proof that is considered of any value in any court, that is not specific enough for the reviewing court or body to determine what was offered.

Exam. Carter: I say I will permit you to *state generally* what you offer to prove, but if you attempt to offer the specific evidence—well, before I make my ruling I will ask the reporter to read back what your statement was.

[fol. 660] (The record was read.)

Exam. Carter: I rescind my ruling on that, and allow that to remain in.

Mr. Gladson: What was your ruling on the offer, Mr. Examiner?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: I ruled that out, but you have made your offer to prove. Formerly I ordered that stricken from the

record. I now allow that to remain in the record, on your statement.

Mr. Gladson: And what is your ruling on my offer?

Exam. Carter: My ruling is that the offer is denied.

Mr. Gladson: And I take exception to that.

By Mr. Gladson:

Q. Mr. Heinemann, did you recently participate in a valuation case on respondent's property before the Secretary of Agriculture?

A. I did, yes, sir.

Q. And what was that proceeding?

A. A valuation case instituted by the Secretary of Agriculture, under his Docket No. 472, in which he was endeavoring to arrive at a valuation of the property of respondent, and to fix if possible our rates covering these various services.

Q. And approximately how long did that hearing last?

A. The actual days of hearings, as I recall, consumed [fol. 661] about 135 days, which with occasional recesses, ran approximately twice that length, almost a year.

Q. And were you present at the hearings in this case?

A. Yes, sir.

Q. And did you testify in those hearings?

A. Frequently, yes, sir.

Q. And did you make any investigation for the purpose of testifying concerning Respondent's property?

A. I did, both as to its property and as to its operation,—I might say as to all of its operations covered by my testimony.

Q. And did you make an investigation of the operations and conditions at other stock yards?

A. I did.

Q. And testified concerning them in this case?

A. At length.

Q. And did you have anything to do with preparing or making a study of the history of the respondent company?

A. I did.

Q. And what did you do in that connection?

A. I wrote not only the corporate history of the company, beginning with its original charter, but arranged it chronologically from such records as were extant, showing the year to year developments as disclosed by public rec-

ords, and such records as it still has in its possession, plus [fol. 662] data which I had accumulated over a long period of years during my fairly close acquaintance with the property of respondent.

That history covered the various improvements made from time to time, as well as the various corporate matters as they were developed from the records, such as were obtainable.

Q. And to what sources did you go for your information?

A. I obtained part of them from government sources, the Library of Congress, Bureau of Census, Department of Agriculture, the City Hall building permits, the records of the Stock Yards wherever they were available, and I was fortunate in obtaining access to what was thought to be the only file of their annual reports—I don't mean financial reports, but what they called their year books running from 1865—or, rather, the first one was 1866, and then on down through the years.

Mr. Smith: Did you find them all?

The Witness: I did not find them at all; they were not mine, they were not the company's, but I was allowed to see them.

Mr. Smith: Were they all found and did you see them all?

The Witness: Yes.

By Mr. Gladson:

Q. Have you made a history of the other live stock markets of the country?

A. Yes, sir, in 1935 I prepared a history covering practically all of the major livestock markets in the United States. That was prepared at the request of Mr. Perry [fol. 663] Ewing, owner and editor of the Hog Breeder and Sheep Breeder, known as the Breeder Magazines, published at the Union Stock Yards in Chicago. These market histories covered the period not only prior to the establishment of those yards, but on down to the history of the organization of the yards, their construction and their various corporate evolutions as the years progressed.

Q. Have any of those been published?

A. Yes, they have been published from month to month, it being his purpose to publish them in book form when the monthly run is completed, which will be probably a year or two.

Q. In what magazine are they published?

A. The Hog Breeder and the Sheep Breeder.

Q. And what are the circulations of those magazines?

Mr. Smith: This is objected to as immaterial, as most of this has been, although I have withheld objection.

Exam. Carter: I sustain the objection.

By Mr. Gladson:

Q. Let me ask you, Mr. Heinemann, are these magazines magazines of general circulation in the live stock industry?

Mr. Smith: Same objection.

Exam. Carter: Same ruling.

Mr. Gladson: Exception.

I offer to prove by this witness, if allowed to testify, that these two magazines he has mentioned are trade journals of wide circulation in the live stock industry.

[fol. 664] Mr. Smith: And the same objection to the offer.

Exam. Carter: The same ruling.

Mr. Gladson: Exception.

By Mr. Gladson:

Q. Mr. Heinemann, there has heretofore been introduced in this record a decision of the Commission in Live Stock Loading and Unloading Charges, Docket 1301, 61 I. C. C. 223, and on page 224 appears this statement: "Except for variations in the size of the properties and in the volume of traffic the arrangement of facilities and the character of operations in the particular service are much the same at the several yards. Incoming shipments are switched alongside so-called chute pens into which the livestock is unloaded".

I think you are familiar with that paragraph, are you not?

A. Yes, sir.

Q. Have you made any investigation to determine the correctness of that evidence introduced by the protestants in this case?

Mr. Smith: Just a moment. May I see that decision a moment?

Exam. Carter: Do you know what exhi that is?

Mr. Gladson: It was one of the exhibits incorporated in the record by reference, Mr. Examiner.

Mr. Smith: Mr. Examiner, this decision to which counsel has directed the attention of the witness is a decision in

which the Commission had before it the measure of the charges for loading and unloading livestock, not only at [fol. 665] Chicago, but at many other yards.

We have here a very different issue, which relates to the Union Stock Yard & Transit Company of Chicago alone, and I object to the question which counsel has asked the witness, as calling for information which is irrelevant and immaterial.

Mr. Fulbright: Mr. Examiner, counsel was very specific yesterday to make it known that these exhibits were being incorporated for all purposes. He has offered them as part of his evidence. It ill behooves him now to try to wriggle out of it by saying he objects to either referring to or explaining them. This witness has a right to discuss those things.

Mr. Smith: I do not think it behooves you, Mr. Fulbright, to try to wriggle into this record the evidence which the Commission has held is irrelevant.

Mr. Fulbright: I am quite aware that counsel does not wish the practices of railroads elsewhere to be brought to the attention of the Commission.

Exam. Carter: Just a moment, I sustain the objection.

Mr. Gladson: Pardon me, but I have not asked any question.

Exam. Carter: Just one minute. Let us see whether you asked a question. I think you did, but I may be mistaken. Read the question, if there is a pending question, Mr. Reporter.

(The question was read.)

Mr. Gladson: I did put a question. It is a preliminary [fol. 666] question, of course.

Exam. Carter: I will sustain the objection.

Mr. Gladson: Exception, and I offer to prove by this witness, if he were allowed to testify, that he has made such an investigation.

Mr. Smith: Same objection to the offer.

Exam. Carter: The offer is denied.

Mr. Gladson: Exception.

By Mr. Gladson:

Q. Mr. Heinemann, will you tell us what investigation, if any, you made to determine the correctness of the statement or finding of the Commission in the exhibit to which I have just referred, in my previous question?

[fol. 667] Mr. Smith: We reach the point again that we reached before many months ago, when it was necessary, unfortunately, to adjourn the earlier hearing here. At the moment of that postponement and for some little time prior to this, Mr. Shaw was persisting in an effort, after the ruling of Commission Splawn, to make detailed offers of proof with reference to great volumes of testimony. The substance of Commissioner Splawn's ruling—and the record will bear me out—was that the Yards Company could make a full, frank statement, but in brief outline of what it was that it desired to prove, and that that would be permitted to stand on the record for any purpose counsel desires to have it for, to discuss the subject with the Commission, or to make some point about it in court, and the Commissioner has ruled that the Commission would not hear these detailed offers of proof that were simply designed to get into the record in another way, a record which they desired to take to court.

The evidence which was held to be irrelevant in that procedure is being debated again here this morning, and I move that be stopped here as it was stopped by Commissioner Splawn, and that these offers to prove be not accepted and that counsel be directed if they have any point of law, or if they have anything that they desire to present that they may state it fairly and frankly, but in no detail what it is they desire to prove in general, and have a ruling made upon that offer.

[fol. 668] Mr. Gladson: I call the Examiner's attention to the fact that I am merely trying to develop the qualifications of this witness and what he has done to prepare to testify in this case. I do not know of any reason why I should not be permitted to develop those qualifications without a lot of interference, needless interference in developing the witness' qualifications.

Exam. Carter: I will deny that motion at this time, but if you desire to raise it later on it will be considered.

Mr. Gladson: Will you read the question to the witness, Mr. Reporter.

(The question was read.)

Mr. Smith: Objected to as irrelevant.

Exam. Carter: Objection sustained.

Mr. Gladson: I offer to prove by this witness, if he is allowed to testify, that in order to refresh his recollection concerning the facilities and operations of the Yards in-

volved in that case, that he has read the record in the case and also made further investigation of these various other yards involved in that case——

Exam. Carter: Does that include the Union Stock Yards in Chicago? I will allow him to testify as to the Union Stock Yards in Chicago.

Mr. Gladson: In connection with the other yards as well as the Union Stock Yards?

[fol. 669] Exam. Carter: I will permit him to testify as to the Union Stock Yards in Chicago, but the offer of testimony with respect to other yards is denied.

Mr. Gladson: Exception.

By Mr. Gladson:

Q. Mr. Heinemann, have you read the record before the Commission in 61 I. C. C. 223, I. & S. Docket 1301——

Mr. Smith: Objected to as immaterial.

Mr. Gladson: As part of your investigation?

Exam. Carter: I will allow him to answer that. Objection overruled.

The Witness: I have, yes, sir.

By Mr. Gladson:

Q. As part of your study in this case, have you read the report in I. & S. Docket 4109 which was introduced by the Commission?

A. I have.

Mr. Smith: Let me have that question read, please.

(The question was read.)

Mr. Smith: It was made a part of the record by Commissioner Splawn, that is really what was done.

Mr. Gladson: All right.

By Mr. Gladson:

Q. And have you read the dissenting opinion in that report likewise?

A. By Commissioner Meyer?

Q. Yes.

A. Yes, sir.

[fol. 670] Q. And have you made any investigation of the conditions at other yards to determine the soundness of

the conclusions of Commissioner Meyer insofar as they referred to other yards?

A. I have.

Mr. Smith: Objected to as immaterial. I do not want to be captious, Mr. Gladson, but if you will have your witness just pause before answering, I can be sure you are through.

Mr. Gladson: I assure you I will do that.

Exam. Carter: Objection sustained.

Mr. Gladson: Exception.

By Mr. Gladson:

Q. In I. & S. Docket 4109 and the report therein, the Commission referred several times to socalled trade and barter methods of determining unloading charges and loading charges at the Union Stock Yards. Have you made any investigation at other stock yards of the country where these methods were in effect, to determine whether or not the railroads had any difficulty in agreeing with the stock yards companies?

Mr. Smith: That is objected to as immaterial for the reasons already given, and for the further reason that this respondent has been unwilling to disclose what its position is on this record, as to whether it wants the barter and trade methods followed at Chicago, or whether it does not, and whether it wants them regulated by some regulatory body such as the Packers and Stock Yards Administration.

[fol. 671] Mr. Gladson: As a matter of fact the witness stated yesterday that if the Commission decided in this particular case that we were not a common carrier, we would file loading and unloading items in our P. & S. tariffs. That is our position, and that was stated before any question on the record.

Exam. Carter: I sustain the objection.

Mr. Gladson: Exception.

I now offer to prove by this witness if he is allowed to testify, that he has investigated the working of the socalled trade and barter method between the railroads and the stockyards, at all of the important livestock markets in the United States, and with the exception of two or three markets, namely, Cincinnati, East St. Louis and possibly one other market, that the railroads and the stockyards companies which perform the unloading service for the railroads have been able to agree, and also prove by the witness that

these methods have not worked any hardship on the railroads.

Mr. Smith: We object to that offer as immaterial, incompetent and irrelevant.

Exam. Carter: I will sustain the objection and I want to state here that these offers giving the details of the testimony are not going to be accepted. In other words we will accept, if you will make your general offer of proof of what you want to prove without showing in detail what the proof is, we will accept that offer of proof, but I am not [fol. 672] going to accept offers of proof in great detail.

Mr. Fulbright: In sufficient specific detail.

Exam. Carter: Yes. Well, I won't use the word "specific" there because the line is very close.

Mr. Fulbright: That is what I was getting at.

Mr. Gladson: Mr. Examiner, I want to reserve an exception to that prophecy. I cannot conceive of a prophecy of that kind being made until the Examiner has heard the offer.

Exam. Carter: The prophecy was made because of your offer in this particular instance.

By Mr. Gladson:

Q. Now, Mr. Heinemann, have you also made an investigation to determine how many yards in this country include in their P. & S. tariffs on file with the Secretary of Agriculture their charges for loading and unloading?

Mr. Smith: Objected to as immaterial.

Exam. Carter: I sustain the objection.

Mr. Gladson: I offer to prove by this witness if he is allowed to testify, that he has made such an investigation.

Mr. Smith: I object to the offer, and I renew the objection I have already made to this method of attempting to circumvent the wish of the Commission that has been so thoroughly expressed, as to how the Yards Company ought to proceed to save any legal point that they desire to save in connection with this matter as to the facts at Yards other than Chicago.

[fol. 673] By Mr. Gladson:

Q. Mr. Heinemann, have you also made an investigation to determine how many of the posted public yards of the United States publish in their P. & S. tariffs that they have filed with the Secretary of Agriculture charges which cover

among other things the loading and unloading of rail borne livestock?

Mr. Smith: Same objection.

Exam. Carter: Objection sustained.

Mr. Gladson: I offer to show by this witness, if he was allowed to testify, that he has made such an investigation.

Mr. Smith: I would like to have the record show an exception to these offers, please.

Exam. Carter: Note the exception, Mr. Reporter. The offer is denied.

By Mr. Gladson:

Q. Now, Mr. Heinemann, have you made any investigation of the official files of the Interstate Commerce Commission to determine which, if any, stockyards file tariffs with the Interstate Commerce Commission?

Mr. Smith: Objected to as immaterial.

Exam. Carter: Objection sustained.

Mr. Gladson: I offer to prove by this witness if he would be allowed to testify, that he had made such an investigation.

By Mr. Gladson:

Q. Will you tell us, Mr. Heinemann, if you have made such an investigation, just what you did?

Mr. Smith: That is objected to for the reason that the [fol. 674] witness was not permitted to answer whether he had made an investigation, and for the reason that it is immaterial.

Exam. Carter: I sustain the objection.

Mr. Gladson: I offer to prove by this witness, if he is allowed to testify, that he went to Washington and spent several days in examining the tariff files and tariff indices of the Commission to determine which, if any, of the Stockyards file tariffs with the Commission, and that he also examined the annual report in the files of the Commission and the indices in regard to annual reports to find which, if any, of the Stockyards of the country filed annual reports with the Commission.

Mr. Smith: Same objection.

Exam. Carter: Offer denied.

By Mr. Gladson:

Q. Have you recently examined the tariff files of the Secretary of Agriculture to determine the contents of the tariffs filed by the various public stockyards of the country?

Mr. Smith: Objected to. The record does not show, what, if any, tariffs were filed, and objected to as immaterial.

Exam. Carter: You are speaking about the Union Stockyards' tariffs now?

Mr. Gladson: I am talking about the Union Stockyards and the tariffs of other stockyards.

[fol. 675] Exam. Carter: He may answer as to the Union Stock Yards tariffs.

The Witness: I did examine the Union Stock Yard & Transit Company's tariff files, in the tariff files of the Packers and Stock Yards Administration.

Mr. Gladson: If this witness were allowed to testify, he would testify to the effect that he has examined the tariff schedules filed with the Department of Agriculture to determine which of the stock yards of the country filed loading and unloading charges with the Packers and Stock Yards Administration.

Mr. Smith: Same objection.

Exam. Carter: Offer denied.

By Mr. Gladson:

Q. Now, Mr. Heinemannn, just what else did you do by way of investigating the issues in this case and preparing yourself to testify?

Mr. Smith: Now, I object to that as calling for a conclusion of the witness and not indicating sufficiently what the character of the evidence is to be, so that there can be a ruling upon its admissibility.

I think that objection is justified, in view of what occurred here within the last hour and a half.

Exam. Carter: I think that is a proper objection under the particular circumstances before us. I sustain the objection.

Mr. Gladson: On the ground that it is too broad?

[fol. 676] Exam. Carter: Well, I mean Mr. Heinemann is a very fluent and fast talker—and I do not mean that in a disparaging way, he is a very clear talker, and in view of the fact that a lot of what he would testify to has been objected to, it is quite possible that what he might further

testify to might be subject to further objection, so I think it would be more orderly if you could indicate a little more specifically by questions——

Mr. Gladson: I don't know what if anything else he has done, and I am trying to find out, Mr. Examiner.

Mr. Smith: I object as immaterial.

Exam. Carter: Well, now, you are placing me in the position of ruling before I hear the testimony.

Mr. Smith: You should make an offer, Mr. Gladson.

Mr. Gladson: I cannot make an offer of proof because I do not know what the witness is going to say.

Mr. Smith: Of course, the counsel can put on a witness and say he didn't know what the witness was going to testify.

Mr. Gladson: I did not say anything of the sort——

Exam. Carter: Now, let us come to order, gentlemen.

Mr. Heinemann, if you have done anything else in the investigations you have described, dealing with the Union Stock Yard & Transit Company, you may state what that investigation consisted of.

The Witness: Obviously, Mr. Examiner, in endeavoring [fol. 677] to prepare myself to testify in this case I did go into very great detail regarding our own operations at the Union Stock Yard & Transit Company, but I find myself seriously handicapped in endeavoring to describe our operations, and my endeavor to comment on the extent they were comparable with others because of the rulings, and I can only say I have examined what I believe to be practically every operation and every fact concerning our operations at the Union Stock Yard & Transit Company.

Exam. Carter: Does that complete his qualifications?

By Mr. Gladson:

Q. Mr. Heinemann, in the report in I. & S. 4109 the Commission quotes from the decision of the court in the Stock Yards case, 226 U. S., to the effect that the Junction and the Stockyards Company are common carriers, among other reasons, because they have been treated as such by the railroads.

Now, referring to the respondent only, what is the situation in that respect today?

A. Well, however nearly the decision of the court may have recited the facts at that time, and I am not disputing

those facts, being not familiar with them as of that date, those conditions do not exist today, and my investigation has satisfied me that the carriers at Chicago are not treating the respondent as a common carrier. For example, in the matter of joining in the tariffs of the companies by con- [fol. 678] currence as prescribed by the Commission's Tariff Circular, there has been only one instance of where that has been attempted, and that tariff is under suspension, and hence it is not effective.

To the best of my knowledge and belief, and according to such information as I was able to develop, there has been no other like action by any of the interstate carriers serving Chicago.

Q. In other words, none of the railroads have joined with the respondent in establishing joint through rates?

A. That is true, with one exception, which, as I say, is under suspension.

Now, the Union Stock Yard & Transit Company, as Mr. Henkle testified yesterday, is a very considerable consumer or purchaser of hay, grains, and building materials of various kinds, and it might be interesting to note the fact that in these shipments coming to the respondent, wherever the freight follows the shipment, the respondent is presented with a freight bill such as is any other industry in Chicago, and that the freight on that particular shipment is not settled between respondent and the switching or line haul carriers by interline settlement as would be the case if it were treated as a common carrier.

Now, then, there is another striking example that impressed me; if the respondent were a common carrier and were recognized to be such by the carriers, as to all cars [fol. 679] which might have been consigned to them, ordinarily they would be handled under the per diem agreement which exists between carriers party to that agreement. The Yard Company, the respondent, is not a party to that per diem agreement, has never been, and has never been invited to become a party to it. Instead, on our shipments we are assessed demurrage as provided in the carriers' demurrage tariffs, and we have been operating under the average demurrage agreement which was executed at the request of the switching line at the Stock Yards, which tendered the agreement to the respondent and it was executed May 2nd, 1918.

I should like, if agreeable, to offer for identification a copy of that agreement.

Q. Will you produce it, please. I will offer this for identification.

Exam. Carter: That will be Exhibit No. 23. 23 for identification.

Mr. Gladson: I will offer Respondent's Exhibit No. 23.

Mr. Smith: No objection.

Exam. Carter: It will be received.

(Respondent's Exhibit 23, Witness Heinemann, received in evidence.)

By Mr. Gladson:

Q. Mr. Heinemann, since the New York Central took over the operation of the Chicago Junction Railway, has the Stock Yards Company and the New York Central subsidiary been operating under this particular agreement?

[fol. 680] A. Yes, sir. I might add, Mr. Gladson, that to verify that fact I have picked up one of the demurrage bills representing a payment of $1,241 paid on demurrage, which occurred immediately prior to and during the International Live Stock Exposition last year, and for the record I will state that that appears on a bill showing that it was rendered by the Chicago Junction Railway, C. R. & I. Railroad Company, lessee. Now, that is not the Chicago Junction Railway Company, but just merely that name, showing the C. R. & I. as the lessee of the property, and I might add that this bill shows the adjustment of the demurrage was made with due allowance as provided in the average agreement and the general demurrage rule.

And further, right in that connection, I call attention to the fact that the respondent is not, has never been, and has never been invited to become a concurring carrier in the general demurrage and storage tariff filed under the authority of the A. A. R.

Now, then, the railroads and the association itself have never invited the respondent to become a member of the association of American Railroads or of the American Short Line Railroad Association. We have never been invited into conferences with respect to what the carriers might or might not do in the matter of through rates, charges, rules and regulations, affecting directly or indirectly the traffic consigned to consignees taking delivery or making ship-

[fol. 681] ments through the Union Stock Yard & Transit Company.

Furthermore, our employes do not receive free transportation such as ordinarily might be accorded to other carriers as a matter of courtesy.

The railroads compute all freight and other transportation charges on shipments of live stock coming into the Union Stock Yards for delivery to consignees at the stock yards or through the stock yards facilities, and I think it might be interesting if I went into a little more detail as to how that particular service is handled there, by describing it so that the Commission might know more accurately just what steps are followed.

When the train arrives at the docks all of the waybills are delivered by the railroad conductor to our receiving office and that office prepares a so-called train sheet or yard book, copying from the waybills the engine numbers, car numbers, consignee and consignor.

Right there I want to interpolate and explain what I mean by receiving office. That might be construed as somewhat of a misnomer. The receiving office is really the nerve center of the Yard operations. To that office come the various marketing agencies to receive information on shipments arriving not only by rail but by truck, and to bring to us instructions as to the handling of the live stock, either in intra yard movement or on shipments arriving for de-[fol. 682] livery to various consignees, either to be sold on the market or to be delivered direct to the patrons, or in the case of outbound shipments, to give us the necessary authority to deliver these to the railroads over which they are to be routed outbound.

And, when I classify that as the receiving office, I want to make it clear that in no sense is its activities confined to the mere receiving of live stock which may be coming in by rail. It is also used for the storage of a vast part of our records which we are required to keep for a number of years, under the rules of the Secretary of Agriculture; and to that office must come the railroad employes, either employed directly by the railroad lines themselves, or through their various agencies such as the Western Weighing & Inspection Bureau and the Central Inspection Bureau, and it is to this office that they must go to obtain many of the records which we have kept, largely for the purpose of maintaining in permanent form the records of the transactions into, out of, and upon the yards.

After writing up the train sheets or the yard book, the waybills are passed on to the government representative who examines them for any violation of time in transit under the 28 hour law, or for any information concerning T. B. cattle or live stock, or cattle which may have been diseased or exposed to disease.

Now, in those cases where they may have originated in an area falling within the quarantine line the waybills [fol. 683] would, of course, disclose that fact.

After the government representative completes his examination and abstracts any information he may desire, the waybills are handed back to our receiving office clerk, who places a stamp on the back of the bills. This stamp contains the name of the railroad and the date of arrival.

The waybills are then delivered to the railroad agency, and they place on the bills the freight rates and make the extensions showing the freight charges, adding thereon any feed or other charges in transit that may have accrued on this shipment; also indicating thereon a correct description of the contents of the car on the freight waybill stub.

I might add also that the Western Weighing & Inspection Bureau operators on our property out there, have under their jurisdiction the matter of the accuracy of weights, the correct classification description, and particularly with respect to the determination of the classification upon animals, such as calves and cattle. That has been almost a permanent argument throughout the country, and our market is no exception. In some places they endeavor to classify according to age, but practically the stock yards all classify them according to their average weight, and the Western Weighing & Inspection Bureau must determine not only our classification of this grade of animals, calves, but they must make sure that the classification used on the waybill [fol. 684] for the extending of the freight, conforms to tariff descriptions. Their work goes beyond that in the case of mixed carloads, and they are a very considerable volume especially in this day and age when we have a variety of rates applicable to mixed carloads.

By Mr. Gladson:

Q. What classification, if any, does the Stock Yards Company follow in classifying animals as between calves and cattle?

A. Ours is strictly a weight classification, Mr. Gladson.

Q. Is that the same as the railroad classification?

A. No, sir, we make ours and have always made ours wholly independent of their classification, nor have we ever been invited to bring ours into conformity with theirs.

Q. And is the Stock Yards Company a party to any of the railroad classifications?

A. It is not a party to any railroad classification or to any railroad tariff.

Exam. Carter: Except the Chicago Great Western?

The Witness: But that is under suspension, Mr. Examiner.

Exam. Carter: You say that is under suspension?

The Witness: Yes.

By Mr. Gladson:

Q. Who prepares the waybills on the inbound shipments?

A. The waybills on the inbound shipments, Mr. Gladson, have been prepared at different points of origin, and generally at the billing station acting for that point of origin [fol. 685] where it originates at what is known as a non-agency station. Those waybills are brought in by the train crews, and turned over to the unloading crews on our property.

On the outbound shipments, the waybills are prepared by the Joint Agency of the railroads, and as Mr. Henkle testified yesterday, we are not a contributing member of that agency, nor does it in any way report to us nor do we report to it, except cooperatively.

Q. Do the waybills show the Stock Yards Company as a carrier, a participating carrier?

A. Never.

Q. Is the Stock Yards Company a member or subscriber to the Western Weighing & Inspection Bureau and the Central Inspection Bureau?

A. It is not, it has never been, nor has it ever been invited to so become.

Q. Is the Stock Yards Company ever asked to confer with the railroads in regard to such matters or other matters in the railroads' policy or interest?

A. They have never been invited to do that.

Q. Is the Stock Yards Company a member of any of the Rate Committees of the railroads?

A. It is not nor has it ever been.

Q. Is it a member of the General Managers Association of the railroads?

[fol. 686] A. It is not and it has never been since the termination of the old arrangement which existed prior to the organization of the separate company to operate its railroad properties. At that time there was a sort of a managers association which did have supervision over certain operations over the rails of the Stock Yards Company. That was, as Mr. Henkle, I believe, testified, prior to 1897—or prior to 1894.

Q. Is it a member or subscriber to the accounting rules and practices of the carriers?

A. It is not nor do our accounting practices conform in any way to the recommendation, either mandatory or recommendatory as prescribed by the Association of American Railroads.

Q. In adjusting your accounts as between the Stock Yards Company and the railroads, do you follow your own special procedure, or do you follow the ordinary procedure followed between railroads in adjusting accounts?

A. We have our own accounting system, which was made wholly independent of the railroads, and there has never been any attempt made to reconcile our accounting system with the accounting systems of the railroads.

Q. Who handles claims on live stock brought in by rail?

A. The line haul carriers.

Q. And who investigates or settles or declines such claims?

A. The line haul carriers, although I might add the investigation sometimes involves referring them to the In-[fol. 687] spection Bureau on the yards for their investigation of our records. Then too I believe that since the first of this year many of those claims are filed directly with Mr. Kemp's office, he being the District Agent representing all of the carriers there, in order that he may prepare and attach thereto certain information to be forwarded to the proper line haul carrier.

Exam. Carter: Now, just a minute. Let me ask you a question.

By Exam. Carter:

Q. Are you referring to claims resulting from damage in transit?

A. I believe he mentioned railroad claims. If he did not, that was what I understood him to mean.

Q. Do you mean claims arising up until after the stock is unloaded into the unloading pens?

A. I might explain, Mr. Examiner, without attempting to tell you when the service ends, that the custom is always for a consignee who may receive a dead or crippled animal, to treat that, certainly during the period of investigation, as a railroad claim until the railroad company has investigated it and shown, to their own satisfaction, that they are not responsible for the loss, in which event it may be treated as a claim that probably involves our mishandling.

Mr. Fulbright: In that connection, Mr. Heinemann, would you just explain the supervision of the Western Weighing & Inspection Bureau where live stock is being received at the [fol. 688] Stock Yards?

The Witness: Yes, sir, Mr. Fulbright. Because of the fact that practically all of our rail haul live stock originates in that territory, so that it moves over lines parties to the Western Weighing & Inspection Bureau, that Bureau has a major part in the so-called policing of the handling operations and the records on the inbound rail live stock. We could have the Central Inspection Bureau, which is just as important relatively as the Western Inspection Bureau, but as I say the live stock originates in territory where the lines are parties to the Western Weighing & Inspection Bureau. The Western Bureau has a number of men located at the yards with offices in the Exchange Building. They are given entree to the property and we endeavor to co-operate with them by making the records available for their observation and checking. These men work around our docks. They are in and out of our various receiving offices. They are working, I might say, in co-operation with us, with our loading and unloading operations, and as part of their duties they inspect the unloading of the stock where the unloading is handled at an hour when they are on duty, and as a general proposition they are on duty at practically all unloading times. Where there is dead or injured stock they make a record of that. The animal is ear-tagged by our employes. If the animal is dead they have their own veterinaries and they necessarily have to follow them through [fol. 689] the rendering works where they make a so-called

post mortem examination in the effort to determine the cause of death. Whether it is death or injury, they make I believe every possible effort to determine what is the cause of that death or injury. Now, the facts resulting from their investigation are not reported to our people; they are reported to their principals, and of course the report would be made to the respective lines with respect to this particular shipment, and in addition to what I have said about what I will call their field crew they have their office in the Exchange Building where there are a number of men who make it their business the following up and obtaining the weights.

I might explain that prior to 1919 it was the custom of the rail haul lines delivering live stock to the Chicago market to weigh the loaded car as it was brought to their Chicago terminals, and then to return the empty car back to the track scale to determine its tare weight, thereby arriving at the net weight upon which freight charges were assessed. We had nothing whatever to do with the ascertainment of those weights. As the result of the work of the Live Stock Committee about which I have testified, they adopted and recommended to the traffic division of the Railroad Administration, a uniform set of rules on hoof weight. That provided that the live stock coming to the various markets, if the railroads—not the yards company—had entered into a weight agreement with the Exchanges operating in those [fol. 690] respective markets, including Chicago, the railroad would permit the use of the hoof selling weights for use in determining their freight charges. I might explain that the hoof selling weight is what, in the trade parlance, is known as the filled weight. That represents the weight of the live stock after it has been brought on the market prepared to move through the machinery of the market to the delivery to the buyer. That means that that stock has been fed and filled with water.

In an effort to reach a reasonable basis for use in the settlement of their freight charges, they agreed to allow certain deductions known as fill allowances. These vary according to species and vary according to time in transit of certain animals.

The net result of deducting this allowance from the filled weight is the billing weight, subject, of course, always to the carload minima applicable to the shipments.

Mr. Smith: Mr. Examiner, I move to strike the witness' testimony as to this contract, as not the best evidence, but I

am willing to have in this record a copy of that contract which bears date April 18, 1916, between the Western Weighing & Inspection Bureau and the Chicago Live Stock Exchange, and which was Exhibit 16 in I. & S. 4244, as showing by its own terms what the fact is as to its contents.

Mr. Gladson: Now, would you be willing to furnish that to us, Mr. Smith?

[fol. 691] Mr. Smith: Yes.

Exam. Carter: Will you furnish that within ten days?

Mr. Smith: Yes, sir.

Mr. Fulbright: I was going to ask the witness if the Stock Yards were a party to that contract?

The Witness: They are not, nor is that contract in effect that was written in 1916. You had better get the current amendments to it.

Exam. Carter: Will you undertake to supply Mr. Smith with the current amendments in effect today?

The Witness: Unfortunately I am not a party to the contract.

Mr. Smith: You have been testifying about what that contract is.

The Witness: I can testify to that from your tariffs.

Mr. Smith: What tariffs?

The Witness: Mr. Boyd's exceptions.

Exam. Carter: This is a contract between the Western Weighing & Inspection Bureau and the trunk line carriers, is that right?

The Witness: No, sir, this is a contract between the carriers and the Live Stock Exchange.

Mr. Smith: The testimony in I. & S. 4244 was that this contract is the contract in effect between the parties thereto. Did you know that?

[fol. 692] The Witness: I have not read the contract, but I know it has been changed since 1916.

Mr. Smith: Well, I will hand it to you and ask if that is the contract governing the arrangement between the parties thereto?

The Witness: I can only say this, Mr. Smith, if this is that contract it does not conform to your published tariff. I think you will find there have been some supplements to that.

Exam. Carter: Will you undertake, Mr. Smith, to furnish a copy of the contract, the contract now——

Mr. Hamilton: Your honor means now in effect?

Exam. Carter: Yes, I mean the one now in effect.

Mr. Smith: My information is that this contract is now in effect, and I will offer it now, if you want me to. If the Yards Company want to show this is not the contract in effect today and that there have been amendments made to it they wish to offer, I have no objection to that.

Mr. Gladson: Mr. Examiner, in view of the fact there have been objections and some misunderstanding as to what the real contract is, and what are the terms of the contract, I am going to withdraw my consent that it be made a part of the record.

Mr. Smith: Now, that is perfectly all right; inasmuch as Mr. Gladson bases that statement on the ground there is dispute as to what this contract is, I move to strike every-[fol. 693] thing the witness has said here orally about his impressions, as being not the best evidence, and let it go at that.

By Mr. Gladson:

Q. What was the source of your information?

Exam. Carter: Gentlemen, I would like to have that contract in the record.

Mr. Smith: All right, sir, I will offer it.

Mr. Gladson: Are you going to offer it at this time?

Mr. Smith: I am going to offer it now, if the Examiner wishes, and to be filed within ten days.

Mr. Fulbright: Mr. Examiner, why can't we have the understanding that if this hasn't any amendments to it, we are perfectly willing for counsel to bring that out? The witness is perfectly familiar with the general practice and how it originates and can certainly testify about it.

Exam. Carter: You will furnish that contract in ten days?

Mr. Smith: Yes.

Exam. Carter: As I understand the situation, Mr. Smith is going to furnish, within ten days, copies of the contract introduced in I. & S. Docket 4244 and marked as Exhibit No.——

Mr. Smith: Exhibit No. 16.

Exam. Carter: As Exhibit No. 16, in that docket, is that correct?

Mr. Smith: Yes. I want it understood that I see no relevancy as to that contract in this proceeding, but inasmuch

as the witness has undertaken to discuss the thing, I am [fol. 694] going to offer that contract.

Mr. Gladson: I am going to object to any post-hearing exhibit at this time unless we have an opportunity to show any incorrect statements about it.

Exam. Carter: You can determine in just a few minutes what this contract is, and you will have permission to file within ten days any amendments or any other contract which supersedes that particular one.

Mr. Smith: Mr. Examiner, my understanding is that there has been some change, and I think this whole thing is perhaps having an emphasis it is not entitled to, but this contract purports to cover certain fill allowances, and while, as I understand it, these people regard this contract as governing their district, there has been some change made in some of those fill allowances with reference to certain stock, and if the Examiner would like me to I would undertake to find out what change has been made in that regard and submit some statement in that connection, in connection with the offering of this exhibit.

Exam. Carter: I am not interested in the change in the fill allowances.

Mr. Smith: All right, sir.

Exam. Carter: This is the only way I am interested. This contains the language of the arrangement as to obtaining weights, and the language of that arrangement is as described in that contract, with the possible exception that [fol. 695] instead of certain allowances named in that contract, there may be different allowances at this time.

Mr. Smith: All right, sir, Mr. Gladson, I don't think Mr. Heinemann will differ from this statement, that these live stock commission people get these weights from the Yards Company, and under this contract we get those weights for those commission people, who use them as the basis for assessing freight charges, isn't that true, Mr. Heinemann?

The Witness: That is true. Mr. Gladson, do you wish me to quote some information as to the determination of freight charges?

Mr. Gladson: Yes, if you will.

The Witness: The waybills carry a waybill stub, which is an exact copy of the main bill, and after the Railroad Agency has supplied the above information, that stub is detached and passed on to the commission firm. The com-

mission firm places the actual hoof weight on this stub, protecting the railroads against excess weight over the minimum, and deducts the established fill allowance, after which, full information is available to compute the correct freight charges and make remittance to the shipper. By that I mean he may deduct that freight which he has paid for account of the shipper, and remit the balance.

The Western Weighing & Inspection Bureau representa- [fol. 696] tives make daily visits to the commission firms for the purpose of inspecting the railroad bills, before they are returned to the Railroad Agency, to ascertain if the weights on the freight bills correspond with the weights on the commission firm's account sales. After the Inspection Bureau has completed its inspection, the freight bills are returned to the Railroad Agency for final handling and recording, and are then sent to the Yard Company for collection. These stub bills are received by the Yard Company about 10 A.M. each morning, sorted by commission firms, and bills are rendered against each individual firm daily, and delivered the following day.

Now, I would like to explain that it is impossible to determine the freight charges unless and until the shipment has passed over the scales in the regular market machinery.

Q. You do not determine that, anyway, do you?

A. That is not now, and never has been our duty, except we do conduct the weighing over the scales.

Q. I mean the computation of the freight charges based on the weight?

A. That is right.

Q. Do they pass over the scales as sold?

A. Rarely, except once in a while they take what is known as the catch weights, but they are not used by the Inspection Bureau.

[fol. 697] Q. In other words, the weights used by the Inspection Bureau are the weights determined upon between the buyer and seller at the time of sale?

A. Yes.

Collections from the commission firms are made semi-weekly; for instance—freight bills received in this office on Friday, Saturday and Monday mornings are included in a three day summary, which is presented to the commission firms on Tuesday morning and collected on Tuesday. Freight bills received on Tuesday, Wednesday and Thursday mornings are handled likewise and the three day sum-

mary is presented on Friday morning and collected on Friday.

Payment of freight charges is made to the Railroad Agency—that is the Joint or District Agency of the railroads——

Exam. Carter: You mean payment by whom?

The Witness: By the Stock Yards Company, semi-weekly, namely, on Wednesdays and Saturdays.

By Mr. Gladson:

Q. In other words, the day after the money is collected?

A. Yes, sir, just as soon as it can be assembled and passed on to the railroad.

Exam. Carter: Just one question at that point. Is that same scheme used in connection with the direct shipments?

The Witness: No, sir, the direct shipments, Mr. Examiner, are handled under an arrangement between the line [fol. 698] haul carriers and the packer consignees, and I might add that the majority of those shipments will be weighed over facilities at or near the packing houses.

Exam. Carter: Off the Stock Yards property?

The Witness: No, some of those scales are our scales and some are packers' scales We are prepared to do it and do do it whenever we are requested, because the yardage rate which they pay includes that privilege.

Mr. Fulbright: Isn't that additional where you collect the charges of those commission firms which use your facilities, and which give bond to your company for all charges, or the payments you might make for their account?

The Witness: If you will broaden that term "commission firms" to include order buyers and marketing agencies, yes, sir, that is true.

By Mr. Fulbright:

Q. Do you handle any through traffic live stock coming in, say, via western lines and going to the eastern markets, that is unloaded at your facilities and then loaded back again into other cars going east?

A. Yes, sir, but not much. We are asked to perform that service by the railroads only when they are short of time under the 28 Hour Law, because, ordinarily, they can feed at the facilities at Calumet Park Yards.

Q. Do they give you any division of the through rate where you perform that transfer service?

[fol. 699] A. No, sir, we get no division of any rate. We are not a party to any divisional arrangement that is in effect.

Q. Is that service somewhat analogous to the transfer of grain by the railroads?

Mr. Smith: I object to that as immaterial.

Exam. Carter: I do not hear you. Did you say something, Mr. Smith?

Mr. Smith: Yes, sir, I objected to his question as immaterial.

Mr. Fulbright: And what is the ruling?

Exam. Carter: What is the question?

(The question was read.)

Exam. Carter: Will you explain what you mean by that, Mr. Fulbright?

[fol. 700] Mr. Fulbright: What I am undertaking to say is as to whether or not stock brought in by the western lines, moving on through over eastern lines, which is taken out of the car through these facilities and put back into the car through these facilities, is analogous in its physical operation and handling, for all practical purposes, with the transfer of grain from car to car at the grain terminals, such as Chicago and Kansas City?

Exam. Carter: I will let him answer.

The Witness: It is quite analogous, Mr. Fulbright, in this respect, that in each case the shipment is brought in by the rail haul or switching line, and is unloaded into facilities which may be operated wholly independent of the railroad or switching line, and when ready to be re-forwarded they are loaded from those facilities into the railroad equipment and moved out over the road designated.

By Mr. Fulbright:

Q. It is, I guess, the same thing.

A. There are certain considerations and privileges accorded grain and grain products, where there are no like privileges accorded at Chicago on live stock.

Exam. Carter: Taking the service Mr. Fulbright has described, that service is required by law, is it not?

The Witness: Yes, sir, that is the 28 hour law.

By Mr. Gladson:

Q. And who pays our charges for yardage and feed?

A. On those shipments, Mr. Gladson, which I have de-
[fol. 701] scribed as having come in there under the 28 hour law, the charges are paid to us, and I mean the charges shown in our Packers and Stock Yards tariffs, as well as the loading and unloading shown in our I. C. C. tariff, by the inbound line haul carrier.

Exam. Carter: Now, when you refer to that you include this $3.00 charge we were talking about yesterday, also?

The Witness: No, sir, that does not apply on our 28 hour law. They pay us for unloading, pay for the feed given to the animals, and pay for our yardage and our loading out charges.

By Mr. Gladson:

Q. Do you perform any other services for the railroads, for which the railroads pay the tariff charge published in the P. & S. tariff of the Stock Yards Company?

A. Mr. Gladson, take, for example, the matter of supplying either full or additional bedding, and we have provisions in our Packers and Stock Yards tariff for a charge for the furnishing of sand or straw or other bedding material. Now, that charge would be applicable whether it was furnished for use in the pens or for use in the cars, but we do have one schedule which applies on material furnished for the cars, and in those cases where the Inspection Bureau upon inspection finds the bedding inadequate or insufficient, or in need of supplemental bedding, they sometimes ask us to supply additional material. In that event we do it and the railroad for whose account the Inspection Bureau had made the request, pays us that charge.

Q. And does that include actually placing the material
[fol. 702] in this car, or do you just furnish them with the material?

A. We supply them with the material in the car, and I mean by that, we make our charge irrespective of what they may be able to charge the shipper, if anything.

Q. And do you happen to know whether the amount they charge the shipper is always enough to cover that charge you make?

A. Their charge is $1.00 for single deck, and $1.50 for double deck. We do not make our charge in any way similar

to theirs, nor do they figure in it. As a matter of fact, rarely do we ever furnish bedding except in excess of the amounts their tariffs permit them to collect.

Exam. Carter: We will adjourn until 2 o'clock, and, Mr. Gladson, will you arrange with the Stock Yards Company to voluntarily postpone the effective date of this tariff?

Mr. Gladson: Yes, we will be glad to do that.

Exam. Carter: You may have received notice from the Commission?

Mr. Gladson: When is the effective date?

Exam. Carter: You voluntarily postponed it to July 15, but you will have to take some action further postponing it before July 15th.

Mr. Smith: I wonder if we can discuss that just a moment off the record?

Exam. Carter: Yes, off the record.

(Discussion outside the record.)

[fol. 703] Exam. Carter: We will adjourn until 2 o'clock.

(Whereupon, at 12:30 P.M., adjourned until 2 o'clock P.M.)

[fol. 704] Afternoon Session

2 P. M.

Exam. Carter: The hearing will come to order. You may proceed.

C. B. Heinemann, resumed the stand, having been previously sworn, and testified further as follows:

Direct examination (Cont'd).

By Mr. Gladson:

Q. Mr. Heinemann, does the respondent issue any bills of lading?

A. It does not.

Q. Do the bills of lading show the respondent company as a participating carrier?

A. They do not.

Q. Does the stock yards company have anything to do with the issuance of drovers' passes?

A. It does not.

Q. How is that handled?

A. They are issued by the pass office, which represents quite a number of the lines providing for free return transportation, plus some of the pass offices of the individual lines which operate their own pass office agencies.

Then also they may be obtained at certain addresses down town, representing so-called general offices of some of the carriers.

Q. Does the stock yards company give any information to shippers concerning railroad rates or services?

[fol. 705] A. No, it does not.

Q. How is that handled?

A. If handled, it would be between the shipper and either the district agent's office, or the employees of the individual lines.

Q. And do some of the Trunk Line railroads maintain traffic representatives at the stock yards?

A. Yes, sir; some maintain both freight and passenger representatives.

Q. Is the Stock Yards Company consulted about, or asked to participate by the railroads in any of the rate cases involving livestock, meat or packing house products, in which collective action is taken by the railroads?

A. Never as a participant. Once in a while we are asked to permit certain of our records to be made use of by railroad representatives in the compilation of their data, but never as a participant.

Q. Does the Stock Yards Company collect any overcharges?

A. You mean, undercharges?

Q. I mean to say, rather, undercharges.

A. No, sir.

Q. Are any overcharge claims filed with the Stock Yards Company?

A. No, sir.

Q. Who handles the overcharge claims?

A. They would be handled directly between the carrier [fol. 706] and consignee or owner.

Q. Is the Stock Yards Company a member of or subscriber to the Central Inspection & Weighing Bureau?

A. It is not, nor has it ever been.

Q. I do not know whether the record shows, or whether you have stated on the record what carriers that organization, the Central Inspection & Weighing Bureau, represents.

If you have not done so, I wish you would so state at this time.

A. That organization, Mr. Gladson, is a successor organization to what formerly was the Joint Rate & Inspection Bureau, representing the so-called Central Freight Association Lines, as contrasted with the Western Weighing & Inspection Bureau, representing the so-called Western Trunk Line carriers. I do not mean by that to imply that the Western Weighing & Inspection Bureau's authority is limited to the Western Trunk Lines. In fact, it goes to the Pacific Coast.

Q. Are you familiar with the work, if any, that the Central Inspection & Weighing Bureau does at the yards in Chicago?

A. Yes, sir.

Q. What does it do?

A. Their duties relate largely to the outbound movement of livestock, so far as livestock is concerned, and that is because we receive very little livestock by rail from those railroads operating in conjunction with the Central Bureau. By reason of that difference in volume of inbound from the [fol. 707] east versus the west, they do not have so many duties, nor do they have anything like the number of employees. They have to do with the supervision of the loading of outbound cars, and making such inspection as may be assigned to them as a duty on behalf of their carriers, covering the inspection of the car, its bedding, or the cargo to be loaded therein.

Q. Who issues the bills of lading on outbound shipments?

A. The bill of lading, or livestock contract in the case of livestock, is issued by the district agency of the railroads, which, as I have said, is not an agency in which we participate.

Q. In the event that a shipment of livestock moving out from the yards, is prepaid, to whom are the freight charges paid?

A. Prepayment would be to the district agency.

Q. I suppose that does not happen very often, however, does it?

A. No, sir, that is a very rare occurrence, as far as livestock is concerned.

Q. In the event of a prepaid shipment, who would pay the freight charges? You said that they would be paid to the district agency.

A. Well, they would be paid, of course, by the consignor, or his designated representative, whoever he might be; but not the yard company.

Q. Do the railroads ever pay any charges, or advance any charges to the stock yards in the event of outbound shipments?

A. Yes, sir.

[fol. 708] Q. What do those charges consist of?

A. Those charges consist of charges for services performed by the yard company, in accordance with our Secretary of Agriculture tariff.

Q. Did the director general of railroads take over the stock yards during federal control?

A. He did not.

Q. What organization, if any, in the State of Illinois, is charged with the regulation of railroads insofar as their intrastate rates are concerned?

A. The Illinois Commerce Commission.

Q. Does the Stock Yards Company file any tariffs with the Illinois Commerce Commission?

A. No, sir, it does not, nor has it ever filed any tariffs with them.

Q. Then it has never been required to do so?

A. No, sir.

Q. By that body.

A. No, sir.

Q. Do you know whether or not the boards that came into existence as the result of the Railway Labor Acts, have ever exercised any jurisdiction over the respondent company?

A. None whatever insofar as stock yards employees are concerned. I might add, Mr. Gladson, that during the NRA regime, the stock yards code was recognized as being proper [fol. 709] for respondent out here; and it was recognized that it would not come under the exemption granted to the railroads thereunder.

Q. Do you know whether the Interstate Commerce Commission has ever made a valuation of respondent's property, under any of the valuation sections of the Act?

A. Of the stock yards property, it has not.

Q. Neither under 19a, nor 15a.

A. That is correct; and I might also say, Mr. Gladson, we have never been required to observe the standard time zones of the Commission, either.

By Mr. Fulbright:

Q. In the case of an intrastate shipment received by rail at your facilities here in Chicago, do you collect the unloading charges just the same as you do in the case of an interstate shipment?

A. Yes, sir.

Q. And are they absorbed by the railroads, in the same way as they are on the interstate shipments?

A. They are.

By Mr. Gladson:

Q. Mr. Heinemann, in the report in I. & S. Docket No. 4109 the Commission stated:

"Through custom and usage, respondent's yards have become, for all practical purposes, the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail; and respondent, by reason of its practices, has held itself out as ready to perform part of the interstate [fol. 716] transportation necessary to effect delivery."

Mr. Smith: Excuse me. May I have that question please, Mr. Reporter.

Mr. Gladson: I have not completed my question. I am just reading this quotation. I have not put any question yet.

Mr. Smith: May I hear what counsel has stated up to this point, Mr. Reporter.

(The question was read.)

Exam. Carter: Finish the question.

By Mr. Gladson:

Q. (Continuing): "Having obtained this status, and thereby having rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common carrier functions to another corporation."

From your study of stock yards history, and your knowledge of the property of respondent, and from your information concerning stock yards that you have gathered, what

comments if any have you to make in regard to the soundness of that conclusion?

A. My observation, Mr. Gladson, would be and is to the effect that, if I correctly understand the statement made by the Commission, I consider that exactly the opposite is the case. I base that upon the fact that at the time the yards [fol. 711] were incorporated and constructed in 1865, we had four active operating stock yards in the City of Chicago, located in different sections, and served by different carriers. Two of those yards were served by the Illinois Central and Michigan Central, lying east of the present property, near to the lake shore. One was the so-called Fort Wayne stock yard, served by the present Fort Wayne division of the Pennsylvania Railroad. The other was the Lake Shore yard, then served by the Lake Shore & Northern Indiana Railroad, now the New York Central Railroad.

In addition thereto, there was the old Bull's Head yard, over at Ogden and Madison, not on a railroad, but served by the so-called Southwestern Pike; then just outside of Chicago, near the present location of Hawthorne, the Burlington had engaged in the construction of a yard.

As the result of those operations, the railroads moved for the establishment of a centrally-located stock yard.

By Exam. Carter:

Q. Before you go on to something else, if I may just interrupt——

A. Surely.

Q. These four separate stock yards that you have just described: when were they in existence, did you say?

A. In 1865, at the time of the organization of the new yards. Some of them had been operated, Mr. Examiner, for some years prior thereto. For example, the Bulls' Head yard had operated from about 1848.

[fol. 712] I stated the railroads moved for that action, and I predicate that upon the fact that the committee which selected the location of the yards, was composed wholly of railroad men, three railroad men.

By Mr. Gladson:

Q. Well now, Mr. Heinemann, if I may interrupt you.

A. Yes, sir.

Q. Does your historical study show you why the railroads took steps to establish a union market?

A. Yes, sir.

Q. Why?

A. Because of the unsatisfactory conditions which were considered impossible for the successful continuance of the operation of those then existing individual yards.

Q. Is it a correct conclusion to say that the yards, separate yards which existed at that time, were impractical?

A. Yes, sir, wholly so, and so considered not only by the producers of livestock, but by the eastern buyers of livestock who were coming to Chicago to buy; and by the railroads themselves, who moved for the organization of a centrally-located stock yards.

Q. And because the then existing yards were so impractical, the Union Stock Yards was established.

A. Right.

Q. That is, the stock yards at Chicago.

[fol. 713] A. The respondent stock yards. The same original corporation, then formed, exists today. And, Mr. Gladson, I might say that before those yards were formally opened for business, some of the small individual yards had been closed, and the materials from those yards were purchased by respondent, and used, so far as practical, in the construction of the new property. That included the purchase of Burlington materials, and the purchase of North Western unused materials, which they had accumulated on their ground over near Wood Street.

Q. Do you know why the railroads were desirous of going into the stock yards business at Chicago?

Mr. Smith: Just a moment, please. What is that question?

Examiner Carter: "Do you know why the railroads were desirous of going into the stock yards business at Chicago?"

A. From my investigation——

Mr. Smith: Just a moment. I object to the question as immaterial. Perhaps I do not understand it, but I do not see any materiality to it.

Examiner Carter: I will let the witness answer.

A. From my investigation of the situation as it then existed, Mr. Gladson, they were prompted in their action by a desire to aid themselves in the more efficient handling of the rapidly developing live stock business, which was proceeding with great strides in the territory lying generally west of Pittsburgh; and from the history of the economic devel-

opment of the industry which followed the establishment of this yard, and the trend of the traffic that followed its de-
[fol. 714] velopment, it is quite obvious that that was their inspiration, so that they might the more efficiently handle the traffic.

By Examiner Carter:

Q. Now, let me ask you another question right there, Mr. Heinemann.

A. Yes, sir.

Q. You mentioned a few moments ago that these individual stock yards were unsatisfactory. Did you say, to everybody?

A. I said that they were unsatisfactory to the producers, to the eastern buyers, and to the railroads. That would include of course the market agencies operating thereon.

Q. Well, in your investigation did you find out or develop that that dissatisfaction on the part, for instance, of the producers, and the buyers, with the existing facilities at that time, had anything to do with motivating the railroads to establish centrally-located stock yards?

A. Unquestionably it did, Mr. Examiner, and I am not speaking without having made a very thorough investigation of the matter. There is still alive a gentleman of unusual intelligence and activity for his age, a man who was present the day these yards were opened, who knew of the situation then existing, and of the steps that led into that development. His father ahead of him had operated in the Fort Wayne yards. In addition thereto, it was my pleasure at one time to interview, and write an article on the exper-
[fol. 715] ience of Mr. Ira W. Brainerd, who was then the oldest active live stock shipper in the United States, and at one time one of the largest. Mr. Brainerd furnished me with the material which I used, and signed the article, indicating his full approval of it; so that when I say there was dissatisfaction on the part of both the producers and buyers, I am not speaking without a full investigation. And there is no doubt but what that dissatisfaction was conveyed to the railroads in no uncertain terms.

By Mr. Gladson:

Q. Is there anything about the nature of the commodity, Mr. Heinemann, which makes it impractical to handle it in

any considerable volume at separate railroad terminals in the same city?

A. Well, of course the inherent nature of the animals is such that they are not marketed until they are what we might call ripe; and by that I mean, the producer who has been finishing the animals will hold them at his place of business, be it on the range, or at the feed lot, until in his opinion the animals are ready for the market. When livestock is ready for the market, it is what I would class as a perishable commodity. It does not perish because of sudden death, or anything of that sort, but from the moment that it reaches the market, it depreciates in value if it is allowed to remain for any considerable period of time. In other words, it loses its bloom, so to speak. You cannot ship livestock to one yard, and store it and hold it there for subsequent resale, [fol. 716] without sustaining a very material financial loss because of depreciation in that process.

Then there is the further comment that finished livestock has but one outlet. It is destined to the shambles, the abbattoirs, where it will be converted into meat and meat products. Obviously, in the case of highly competitive business, those abbattoirs and packing houses cannot be operated where there is a limited supply of livestock available. Invariably you will find them concentrated around a central stock yards, just as they are around the property of respondent here at Chicago. That is because they must be near to a supply of livestock of various grades, various weights and various species, because theirs is a demand which requires them to keep supplied with the raw materials from which they can obtain their supply; in this case, livestock.

If you were to destroy the property of respondent, and re-establish individual stock yards on the trunk line carriers serving Chicago, why, that of course would result in the complete decentralization of your packing houses out here around these yards, and no large packing house could afford to locate at an individual yard served by merely one carrier, for example. It just would not be economically practicable.

Q. Well, has it ever, since the yard was established, been practicable for the railroads to establish their own livestock terminals in Chicago?

[fol. 717] A. For the handling of their entire business?

Q. Yes.

A. No, sir, not in my opinion.

Q. Mr. Heinemann, do the railroads extend transit privileges on any livestock moving through the stock yards?

A. Yes, sir, they do; perhaps with less transit at Chicago than any other market; but we do have some limited transit at Chicago.

Q. In what connection; that is in connection with what shipments?

A. Well, for example, on stocker and feeder livestock which comes into Chicago by rail, and is sold and re-shipped within the designated time, by rail to the territory defined in the description, there is a refund allowed on the inbound shipments upon proper identification and proper certification that the identity of the animals has been maintained.

Q. And how do the railroads determine, or satisfy themselves that the identity of the animals has been maintained?

A. Through the medium of the Inspection Bureau; in th[illegible]ase the Western Weighing & Inspection Bureau.

Q. They do not ask the stock yards to help them in that respect, do they?

A. They not only do not ask them to, but they would not accept our certification unless it had been certified further by the Inspection Bureau.

[fol. 718] Q. Mr. Heinemann, is the respondent in this case seeking to escape regulation?

A. I do not so understand it.

Q. Now, can you elaborate in any way on what Mr. Henkle told us yesterday, as to the reasons why the respondent company objects to dual regulation by the Interstate Commerce Commission and the Secretary of Agriculture.

Mr. Smith: Mr. Examiner, I do not believe that is material.

Mr. Gladson: You have gone into our motives, Mr. Smith, and Mr. Henkle was interrogated at length.

Examiner Carter: He may answer.

A. In the first place, Mr. Gladson, with all due respect to whatever agencies may be the regulatory bodies, dual regulation is bound to have conflicts. In our case we have the Secretary of Agriculture regulating our activities to the extent of those services which account for approximately 90 per cent of our revenue. Those stock yards services are published in our Packers & Stock Yards tariffs filed with the

Secretary of Agriculture as required by the Packers & Stock Yards Act, 1921, and the regulations thereunder.

The other 10 per cent, or approximately 10 per cent of our revenue from operations, is derived from the loading and unloading of livestock, and from the few additional services, such as the occasional bedding of cars, and things of that sort, which we may perform for the carrier; and [fol. 719] from which we receive a revenue.

We have the added difficulty, if you please, that the Secretary of Agriculture and the Interstate Commerce Commission may not, and in fact do not agree upon the records to be kept and maintained as to our respective activities. Obviously it would be difficult, and highly impracticable, to keep two complete sets of books each of which would correspond to the suggestions, recommendations or orders of the different regulatory bodies.

By Mr. Smith:

Q. If I may interrupt, Mr. Heinemann, what are you doing in that regard at the present time?

A. Well, we are keeping our books so as to reflect the true facts; and we endeavor to satisfy the two bodies as nearly as we can. But it is far from being a satisfactory arrangement, and is one which involves much explanation and considerable correspondence and detailed discussions.

Obviously the major part of our entries are subject to the Secretary of Agriculture. The Secretary of Agriculture, Mr. Gladson, as you know, since the passage of the Packers & Stock Yards Act, 1921, has engaged in two valuation cases in connection with our property. One of those began shortly after the act was enacted, about 1922, I believe, and continued until it was finally dismissed, about 1929. The other started last year, and continued into this year. That is still pending before the Secretary of Agriculture. In his handling [fol. 720] of a matter of that kind, his work is handled by men who have largely been educated in the stock yards business. I might say that they are stock yards-minded. They are familiar with our operations; and I am frank to say that they are frequently more familiar with stock yards operations, sometimes, than the stock yards men themselves, because of their more general knowledge. They have the advantage of observing the operations at some 135 posted

markets, where the individual yard operator may be very limited in his perspective.

The cases of the Secretary of Agriculture, where they are comprehensive valuation cases, necessitate the complete appraisal of all of our real estate, our physical properties, substructures and superstructures; and a complete analysis of all of our accounts, showing our receipts and our disbursements; and the various allocations of our items of expense; and he in turn passed upon their propriety, as he is entitled to do under the law.

In the handling of these cases, as I stated, he takes in our entire property. That includes not only those areas which may be devoted exclusively to what we might call strictly stock yard operations, but it includes also such properties as might be included in what some term transportation, but which I personally think are still part of our stock yard operation.

By Mr. Gladson:

Q. Well, Mr. Heinemann, the rates which the Secretary of Agriculture, after a valuation proceeding, finally fixes, [fol. 721] are based to the end that the company may get a fair return on the value of the property devoted to those services, are they?

Mr. Smith: Just a moment. That is objected to. That calls for the conclusion of the witness. The Secretary of Agriculture has never fixed any rates for the Stock Yard Company; and if and after he does, I venture to guess that the Yard will probably take the position that he has not done just the thing that Mr. Gladson is saying he ought to do.

Mr. Gladson: In any event, that is a matter of opinion.

Exam. Carter: Just a moment. Read the question, please, Mr. Reporter.

(The question was read.)

Mr. Smith: If counsel will make that statement his own, representing his own opinion, why, then I will not make any objection.

Mr. Gladson: I have asked my question, Mr. Smith, and I do not want any suggestions, or at least, do not welcome any, as to what I should say.

Exam. Carter: Read me the question again, please, Mr. Reporter.

Mr. Gladson: Perhaps the question is not very clear, Mr. Examiner. Let me withdraw the question, and ask another.

Exam. Carter: Very well.

By Mr. Gladson:

Q. Mr. Heinemann, do you know the method which the [fol. 722] Secretary of Agriculture follows in establishing rates for the various yards, after a valuation proceeding?

Mr. Smith: Just a moment. That also is objected to as immaterial, Mr. Examiner.

By Exam. Carter:

Q. Has it ever been done?

A. Yes, sir.

Q. So far as this Stock Yard Company is concerned?

A. No, sir. As I stated before, we have had just the two cases, but one has not as yet reached final determination. I understood counsel to ask me, Mr. Examiner, as to the procedure in cases of that character, and my familiarity with it.

Q. Is that procedure fixed by statute, if you know?

A. It is limited by statute, yes, sir.

Exam. Carter: Well then, do you not think the statute will speak for itself as to that?

Mr. Gladson: No, Mr. Examiner; the statute does not outline the details of it. The Secretary of Agriculture follows valuation methods followed by the state commissions in fixing rates of utilities.

Exam. Carter: I do not know whether this witness is competent to testify as to the procedure followed by the Secretary of Agriculture in arriving at rates to be charged. He might outline certain steps in the procedure, but how he would arrive at his conclusion as to the procedure followed, is another matter.

[fol. 723] By Mr. Gladson:

Q. Mr. Heinemann, have you read the orders and decisions of the Secretary of Agriculture, made as the result of valuation proceedings at other stock yards?

Mr. Smith: That is objected to.

Exam. Carter: I could not hear that question.

Mr. Smith: Read it please, Mr. Reporter.

The Reporter: I could not hear it either, your Honor.

By Mr. Gladson:

Q. The question is: have you read the orders and decisions of the Secretary of Agriculture, made as the result of valuation proceedings at other stock yards.

Mr. Smith: That question is objected to as immaterial.

Exam. Carter: The objection is sustained.

By Mr. Gladson:

Q. Well, in any event, Mr. Heinemann, is it true, for the reasons which you have attempted to give, that if you must be regulated, you would rather be regulated by the Secretary of Agriculture exclusively, than by the Interstate Commerce Commission? Is that true, or not?

A. For the reasons which I have attempted to outline, yes, sir, I think that is very true.

By Exam. Carter:

Q. Is that the decision that your company has arrived at?

Mr. Gladson: I beg your pardon, your Honor; I did not hear.

By Exam. Carter:

Q. I say, is that the decision your company has arrived at, or is that simply your own personal decision?

[fol. 724] A. Well, I might say, Mr. Examiner, that that is the decision which was announced to me by my superior officer; and I assume unquestionably that he spoke with authority in the matter.

Q. If this Stock Yard Company should be held to be not a common carrier at the present time, who would regulate this charge?

A. My personal belief is, Mr. Examiner, I think that with all propriety the Secretary of Agriculture would regulate the charge.

Q. Under the existing law?

A. Yes, sir.

Mr. Gladson: As a matter of fact, Mr. Examiner, that is a question that I intend to argue before the Commission.

Exam. Carter: Well, I am just asking for the opinion of this witness in the matter.

Mr. Gladson: Yes.

By Exam. Carter:

Q. Now, you say that your superior officer has announced to you the decision of the company, or its preference, to be regulated by the Secretary of Agriculture. Do I understand you correctly?

A. Yes, sir.

Q. Have your superior officers taken any steps to accomplish that end?

A. I consider this as one of the preliminary steps. I accept Mr. Henkle's statement to the effect that if released [fol. 725] from the Commission's finding, he will then publish and file this loading and unloading charge with the Secretary of Agriculture. I would accept that as true, and as being the probable second step.

Q. Has your company, that you know of, proposed any additional steps?

A. I know of no additional steps beyond that, no, sir.

Exam. Carter: Go ahead.

Mr. Smith: May I ask the witness a question right there?

Mr. Gladson: Now, just a moment please, Mr. Smith. I am examining the witness. The Examiner would not let Mr. Heinemann complete his statement, as to why the company preferred regulation by the Secretary of Agriculture, in the face of the objection.

Mr. Smith: I had not thought of interrupting you——

Mr. Gladson: (Continuing:) And perhaps my question was not properly put. But right at this point on the record, I want to say—and I am not testifying now, Mr. Smith, or intending to testify; but as far as my own personal opinion is concerned, I think that the method followed by the Secretary of Agriculture in fixing rates as the result of a valuation proceeding, assuming that he followed the principles laid down by the courts,—and I am not predicting whether he will or not, in our case—is a better method of fixing rates for stock yard services than the methods that are [fol. 726] ordinarily followed, and necessarily so, by the Interstate Commerce Commission in fixing railroad rates.

It is more susceptible, I think, to justice to the patrons of the stock yards, and to the stock yards. Now with that explanation——

Mr. Smith: Just as a brother lawyer, would you accept the suggestion that you withhold your judgment on that until you see the decision in the other case?

Mr. Gladson: There is one question I do want to ask Mr. Heinemann.

By Mr. Gladson:

Q. Mr. Heinemann, you stated that the Secretary of Agriculture, you thought, was stock yards-minded.

A. His employees were, I believe I said.

Q. Well now, did you mean by that, that his employees are prejudiced in favor of stock yards?

A. Far from it.

Q. What did you mean?

A. I meant, Mr. Gladson, that they were men who are closer to a full understanding of the operations of stock yards companies, their liabilities to the public, and their general situation in the livestock marketing picture.

Q. And you would expect the Secretary of Agriculture to know more about the handling of livestock, than you would the Interstate Commerce Commission?

A. Absolutely, yes, sir; and that is said without any [fol. 727] thought of disparaging the Commission's ability, in the least.

Exam. Carter: You cannot hurt the feelings of the Commission.

By Mr. Gladson:

Q. Now let me ask you, Mr. Heinemann, whether or not examiners and accountants of the Interstate Commerce Commission come out regularly and examine the books of the Stock Yard Company.

A. They come out, and they are accorded the full measure of privilege, just as is accorded the Packers & Stock Yards Act men.

Q. The Packers & Stock Yards men also come out?

A. Yes, sir.

Q. Has the Chicago Junction Railway Company any tariffs on file with the Interstate Commerce Commission?

A. No, sir. Their tariffs were adopted, as required by the Tariff Circular of the Commission, by the lessee company.

Q. Will you explain the facts, in order that the record may be fully clear, about the method of filing, or establishing rates that are contained in tariffs on file with the Secretary of Agriculture, and the changes that have recently been made.

The Witness: I am sorry; may I hear the question again please, Mr. Reporter.

Exam. Carter: Read the question.

(The question was read.)

A. I think, Mr. Gladson, it might be well to make the [fol. 728] record entirely clear on that feature. The formality of filing tariffs with the Secretary of Agriculture is much less onerous than in the case of filing them with the Interstate Commerce Commission, in this respect, that he has less rigid rules. For example, a market agency may register, and qualify under the Packers & Stock Yards Act; and all it needs to do in the way of filing a tariff, is to write a letter to the Secretary of Agriculture, or to the Department of Agriculture, advising him to the effect that it will use the same rates and charges as provided in such and such a tariff, that may be filed by someone else.

There is no such thing as formal concurrences, or powers of attorney, or things of that sort, required under their rules, as is the case with the Commission.

Now, in the filing of tariffs, they do prescribe certain fairly clear rules as to the structure and form of the tariffs, but they are filed to become effective upon ten days' notice. If they represent a reduction in charges, as is frequently the case in the case of feed, one may file upon one or two days' notice, without the necessity of obtaining formal permission from the Secretary of Agriculture for that privilege.

The Secretary of Agriculture, in accepting such tariffs, does not indicate his approval, so as to be later estopped from challenging those rates in a rate proceeding. He simply acknowledges receipt of the tariff; that is if he does [fol. 729] not elect to suspend it, he acknowledges receipt of the tariff, and of course it is accepted for filing.

Mr. Smith: I will accept this, in lieu of my request upon Mr. Henkel to furnish that letter.

Mr. Gladson: All right.

By Mr. Gladson:

Q. Now, Mr. Heinemann, do you know how extensive the valuation proceeding made by the Secretary of Agriculture, which started in 1923, was?

Mr. Smith: That question is objected to as immaterial, Mr. Examiner.

Exam. Carter: I did not hear all the question. Read it please.

(The question was read.)

Exam. Carter: I do not quite see its materiality, but I will permit the witness to answer the question.

A. Yes.

Exam. Carter: Very well.

A. (Continuing:) It was most comprehensive. It included every bit of respondent's realty; their structures, all of their facilities; and it included also the usual and customary analysis of the accounting, and the allocation of the different items of income and expense to the respective units of property appraised by them; and it really consisted of what we might call two appraisals, but the net result, as I have indicated before, was that there was never a formal order [fol. 730] issued, setting, or freezing, as you mentioned yesterday, the rates of respondent, except to the extent of requiring the removal of discrimination in one phase of the rates. The order was finally an order of dismissal.

By Mr. Gladson:

Q. That investigation was initiated by the Secretary of Agriculture, was it not?

A. Yes, sir.

Q. And dismissed by the Secretary of Agriculture.

A. Yes, sir.

Mr. Smith: Well, now, I would like to have a copy of that order, rather than the comment of the witness on it. I do not think any of this is material, but if it is, I want the order, rather than what counsel or the witness may say about it.

Exam. Carter: Will you furnish a copy of that order?

Mr. Gladson: Which order?

Exam. Carter: The order you were just referring to.

Mr. Smith: The order you were just talking about.

Mr. Gladson: Of dismissal?

Mr. Smith: Yes.

Mr. Gladson: If we can get one.

Exam. Carter: Well, any order entered by the Secretary of Agriculture; any order after the order of investigation, entered by the Secretary of Agriculture, after that proceeding was submitted, relating to that proceeding.

[fol. 731] Mr. Gladson: We will undertake to get it, but I do not know whether we can get it within 10 days or not.

Exam. Carter: Well, if you cannot get it in 10 days, can you get it in 15 days?

Mr. Gladson: I think so.

Exam. Carter: All right.

By Mr. Gladson:

Q. Now, Mr. Heinemann, there has been a whole lot said here about the so-called $3 charge. I have objected to it because I do not think that it is material to the issues in this case; but as long as my objections have been unavailing, I want to ask you one question about it.

How did the auditors for the Secretary of Agriculture, and the accountants for the Secretary of Agriculture, in the present valuation proceeding, treat the uncollected accruals, as the result of the $3 charge?

Mr. Smith: That is objected to as not being the best evidence of the fact, which it purports to state.

Mr. Gladson: You do not want us to bring in those 11,000 pages of testimony, do you?

Mr. Smith: I did not know that the entire 11,000 pages of testimony related solely and exclusively to the $3 charge. I do say this, however, that if you are going to undertake to show here what the government did in that case with reference to the $3 charge, then I insist that it be shown by the best evidence.

[fol. 732] Mr. Gladson: Well now, if the Examiner please, the entire matter can be disposed of in one answer, instead of bringing in a lot of records. Mr. Smith, I believe, has had a copy of the record in that case, and he can check it, and Mr. Zelinski, who is Mr. Wallace's right hand man, is here, and if there is any doubt about the trustworthiness of it——

Mr. Smith: You say, I can check it. If you will furnish me with a copy—or a statement of that portion of the record which you want to offer, I do not think I would check it, but I think I would just take your statement, that it was correct, as I asked you to take mine yesterday.

Mr. Gladson: Mr. Examiner——

Exam. Carter: Well now, we do not need to get into any lengthy discussion here. Mr. Smith has objected, and I will have to sustain the objection.

Mr. Gladson: Well now, just what is it you want, Mr. Examiner, by way of proof here——

Exam. Carter: Read the question, please.

(The question was read.)

Exam. Carter: You can show that by the record in that case. That is the only way I know of, by which you can show it,—the portion of the record where it is dealt with; unless Mr. Smith wants to enter into some agreement in the matter.

Mr. Gladson: Well, I do not understand why we should be so extremely technical in this case. The facts are—and [fol. 733] again, Mr. Smith, I am not going to testify at all——

Exam. Carter: Well now, this witness would be only expressing his conclusion as to how certain matters were treated by the witness for the government in another case. That is simply his opinion.

The Witness: Well, no.

Mr. Gladson: No, it is not a question of opinion, if the Examiner please, but it is a question of fact. That is, it may be a conclusion, but nevertheless, there is not any mistake about it.

Exam. Carter: Well, there may not be, but if Mr. Smith insists upon his objection, I will have to sustain the objection.

Mr. Smith: I do insist upon the objection, because I think it is a fair objection.

By Mr. Gladson:

Q. Then I will ask Mr. Heinemann whether or not the government in presenting its case in that valuation proceeding to which I have referred, treated the accruals of this $3 charge, as income to the company.

Mr. Smith: That question is objected to as leading, and as merely an attempt to circumvent the ruling sustaining the objection heretofore. That is not the best evidence.

Exam. Carter: The objection is sustained.

Mr. Gladson: If the Examiner please, I offer to prove by this witness that the government, in presenting its case in that valuation proceeding to which I have referred, treated [fol. 734] the unpaid and accrued amounts in connection with the $3 charge, both on outbound shipments and inbound shipments, as revenue to the company.

Exam. Carter: In other words, your offer constitutes a statement by this witness to that effect; is that correct?

Mr. Gladson: That is right.

Exam. Carter: And not the record——

Mr. Gladson: That is what he would testify to.

Exam. Carter: And not the record in the case to which you have referred.

Mr. Gladson: Well, I do not have that record here. As I stated before, Mr. Examiner, it seems to me the ruling of the Examiner, while perhaps technically correct, works a hardship on us, because I do not know that there is any one place in that record where that can be found, except possibly in a voluminous exhibit that was put in by the government.

Exam. Carter: Well then, your offer of proof, is an offer to prove by this witness the statement that the government did so treat it in the case you refer to.

Mr. Gladson: Yes.

Exam. Carter: Is that it?

Mr. Gladson: Yes.

Mr. Smith: The same objection.

Exam. Carter: The objection is sustained, and the offer is denied.

[fol. 735] Mr. Gladson: Note an exception.

By Mr. Gladson:

Q. A considerable number of questions have been directed to witnesses for the respondent in this case concerning an increase in rates or attempted increase in rates by respondent.

Do you know what led the respondent to increase its charges or its rates for various services?

A. Yes, sir.

Q. What was it?

Mr. Smith: Well, will you specify what charges you want to direct the attention of the witness to, Mr. Gladson.

Mr. Gladson: Well, there has been a general increase in charges, if the Examiner please.

Exam. Carter: You mean, for stock yard services?

Mr. Gladson: Yes.

Exam. Carter: So-called?

Mr. Gladson: Yes.

Exam. Carter: I understand that there has been no increase recently in the loading and unloading charge.

Mr. Gladson: No, there has not been any increase in the loading and unloading charge, but there has been an increase in other charges, and I am trying to find out. We apparently have been criticised because we tried to get more revenue. Now, I want to find out from this witness whether we need more revenue.

Mr. Smith: If the Examiner please, I tried to ascertain [fol. 736] from the witness Henkle yesterday what their yardage charges were in 1915, so that we could see what this measure of increase is, that Mr. Gladson is talking about.

Mr. Gladson: I am not talking about——

Mr. Smith: If I may finish, please.

Mr. Gladson: Yes.

Mr. Smith: (Continuing.) And Mr. Gladson objected to that as immaterial, and the objection was sustained.

Mr. Gladson: I am not talking——

Mr. Smith: If that was immaterial, then this is likewise immaterial.

Mr. Gladson: I am not talking about 1915.

Mr. Smith: But I was.

Exam. Carter: Well, I asked my question to clarify your question. Now, did you object to that specific question? I do not recall that you did.

Mr. Gladson: Yes, I think so.

Mr. Smith: Yes, that question was objected to. It is in general terms, and invites a discussion by this witness which we can fairly anticipate will not be a short one, with reference to just any general increases that have been made in their charges, without any regard to what increases were previously made. In any such by-and-large way, I say that such an answer is immaterial to this case; and if the Examiner thinks otherwise, and if Mr. Gladson thinks otherwise, [fol. 737] then I do insist that it appear in this record what their yardage charges were in 1915, for example, so that we can see what the measure of these increases is, that we are talking about.

Mr. Gladson: I want to show merely, if the Examiner please, that the Stock Yard Company's business has fallen

off recently, and they need more revenue; and that is the reason for the increase in the rates. Now, if the Examiner does not think that testimony along these lines is proper, after all of the questions that have been put to our witnesses, and the innuendos, and so forth, about our increasing our rate——

Exam. Carter: Well, I will let the witness answer the question, but on condition that you do furnish those charges in 1915.

Mr. Gladson: No, we will not furnish any charges in 1915, Mr. Examiner, as a condition to having one of our questions answered. Now, I do not think——

Exam. Carter: In other words——

Mr. Gladson: (Continuing.) I do not think it is Mr. Smith's province to attach conditions to the answers to my questions, and if I may suggest, I do not think that the ruling of the Examiner in adopting what may have prevailed in 1915, as a condition to my getting an answer to my question, is proper; and I want to preserve on the record an exception to it.

Exam. Carter: All right. Is it possible for you to furnish [fol. 738] what the charges were in 1915, Mr. Heinemann?

The Witness: They were not published at that time, Mr. Examiner. I am not sure whether that information would be available or not. I would not want to commit myself.

Exam. Carter: Will you make an effort to ascertain if you can find out what those charges were, and if you can, file that information with the Commission within 15 days, say?

Mr. Gladson: If the Examiner please, I do not think we are willing to furnish those charges, because that matter is not material to any of the issues in this case. As a matter of fact, that question was attempted to be gone into yesterday, and I understood the objection to it was sustained.

Exam. Carter: The objection is sustained.

Mr. Gladson: I will have to note an exception.

By Mr. Gladson:

Q. Mr. Heinemann, have you prepared an exhibit which shows the names of the Trunk Line railroads that serve Chicago?

A. I have.

Q. Pardon me, if the Examiner please; may I withdraw that question?

Exam. Carter: Surely.

By Mr. Gladson:

Q. Mr. Heinemann, did you recently examine the tariff files of the Interstate Commerce Commission for the purpose of determining and securing information concerning the line haul rates of the carriers, on livestock to Chicago [fol. 739] and to other points?

A. Yes, sir, both to and from Chicago.

Q. What did you do in that connection, Mr. Heinemann?

A. I endeavored, Mr. Gladson, to obtain references, or photostatic copies, which would clearly identify the tariffs and schedules in those tariffs, showing representative tariffs of each of the 22 Trunk Line railroads serving Chicago; plus some of the so-called agency tariffs of the agencies publishing rates to and from Chicago for and on account of their member lines.

Q. And do some of those tariffs also show the rates to other public markets published by those roads which serve Chicago?

A. Yes, sir, in the same tariffs as the Chicago rates.

Q. Will you please proceed, Mr. Heinemann, to produce those tariffs, and the other documents that you have.

Exam. Carter: This appears to be a convenient place to take a five minute recess.

(Thereupon a short recess was taken.)

Exam. Carter: The hearing will come to order. You may proceed, Mr. Gladson.

By Mr. Gladson:

Q. Mr. Heinemann, have you prepared a tariff memorandum which explains the tariffs which you are going to produce?

A. I have.

Q. That is, the tariffs and other documents.

[fol. 740] A. Yes, sir.

Mr. Gladson: I find that we have just three copies of this, if the Examiner please. Mr. Heinemann has one, the

reporter has another one, and Mr. Smith is welcome to look at mine.

Mr. Smith: Well now, just a moment. Either on the record or off the record——

Exam. Carter: Take it on the record, Mr. Reporter, until we see.

Mr. Smith: Will you be good enough, Mr. Gladson, to state what this data is, that you are preparing to offer now? I did not catch it, if you have so stated.

Mr. Gladson: Among other things, Mr. Smith, it shows the method of publishing the line haul rates to the Union Stock Yards by the various carriers that serve Chicago. It shows how the stock yards is shown in the tariffs, how it is designated in representative tariffs, in various items.

Mr. Smith: Well, does it show that in the form of actual excerpts from the tariffs, or simply data taken from the tariffs? I did not get that.

Mr. Gladson: No; in most instances it shows photostatic copies of the actual tariffs.

Mr. Smith: Well now, if you will tell me the purpose in showing that with respect to Chicago, I do not think I will have any objection to offer to it. What is the purpose?

Mr. Gladson: Well now, I do not want to misrepresent [fol. 741] the situation. Some of these tariffs also show rates published to other livestock markets.

Mr. Smith: Well, may that data be considered just as if it were not in the record? You are not offering that per se, I take it?

Mr. Gladson: I am only asking that the documents be marked for identification at this time, and then later on I will offer them.

Mr. Smith: Well now, do you mind stating the purpose of showing this data with respect to Chicago?

Mr. Gladson: I think it will be helpful, in determining whether or not the Stock Yards Company is a common carrier, to see how it is treated by the railroads in their tariff publications.

Mr. Smith: Well, I do not get it. I do not see the point, insofar as Chicago is concerned, and I think I will have to object to it, therefore, as immaterial with reference to Chicago; although I think, if an adequate explanation were made as to why it is deemed to be helpful, I might agree with counsel that it is material. However, as the record

stands, I will have to object to it insofar as Chicago is concerned, as being immaterial.

Mr. Gladson: I am not offering anything as yet, Mr. Smith. I am simply asking the witness to identify the exhibits. I cannot conceive of an inquiry that went into all of the facts as to the status of the Chicago yards, that would [fol. 742] not bring before the Commission the manner in which the line haul carriers treat the stock yards in their published tariffs.

Exam. Carter: You have not offered anything as yet, have you, Mr. Gladson?

Mr. Gladson: I have not offered anything yet, no, Mr. Examiner. I am just simply going to ask the witness to explain, and have marked for identification, the exhibits which he has prepared.

Mr. Smith: Then if the Examiner please, I would request that the identification marks that counsel asks to have put on these exhibits for the purpose of convenient designation, be letters rather than numbers, because I am going to object to the admission of the documents into evidence, and I do not think they ought to be given exhibit numbers at this time.

Mr. Gladson: Well, we expect to offer them as exhibits, but it seems to me that before we can make any offer, we will have to have them identified.

Exam. Carter: Well, I have nothing before me, as I understand it, right now.

By Mr. Gladson:

Q. Will you please proceed, Mr. Heinemann, to produce the exhibits referred to.

A. Well, Mr. Gladson, I have prepared what is in the nature of a single exhibit, composed of 30 units, photostatic copies of tariffs in whole or in part, covering the rates, rules and regulations applicable to livestock shipments to [fol. 743] or from Chicago; and with particular reference to rates to and from consignors and consignees at the Union Stock Yards Company at Chicago.

Obviously it is impossible to segregate these tariffs, to be used exclusively at Chicago, because of the fact that they are published for the convenience of the carriers by including not only Chicago, but a great many other basing points or destination points, if you please, other than Chi-

cago. In other words, it would be of course physically impossible to mask from these tariffs all of the material in them except that relating exclusively to Chicago. Obviously it has been necessary to include in here some tariffs, such as the Pacific Freight Bureau tariffs, where the rates do not apply in some cases specifically to Chicago, but might be used in conjunction with other tariffs for the making of combination rates, in some instances. They are used in the exhibits purely as representative tariffs, and by no means do I represent that the 30 units included herein, are all or anywhere near all of the tariffs published and filed by the railroads of the United States covering livestock traffic; nor by the railroads serving Chicago. Included in these 30 units I will have in some cases only one tariff of one line, treating it as representative; while in other cases I will have perhaps half a dozen of their tariffs for the purpose of showing the exact manner in which they approach the publication of rates to and from respondent's property. [fol. 744] I have assembled these with the intention of offering them for identification as one exhibit, intending if you please, to make an explanatory narrative description of the tariffs, just as briefly as possible, and just enough so that the record may present a comprehensive understanding of the facts which the tariffs disclose.

Mr. Gladson: If the Examiner please, may we have these documents marked for identification at this time.

Exam. Carter: Just a moment. Is it your purpose to make reference to or make use of the rates in the tariffs to other points, to points other than the Union Stock Yards at Chicago?

Mr. Gladson: Well, Mr. Examiner, the witness is not going to comment, as I understand it, at this time, on the rates to other points, except possibly in explanation of the exhibit. It is my intention later on to offer these documents, not only for the purpose of showing the rates to Chicago, but, in instances where they show rates to certain other livestock markets, to offer them for that purpose also.

Exam. Carter: Will you indicate by a question, or something of that kind, when you intend to do that. In other words, am I to understand this, that the discussion that the witness will now enter into, will deal solely with the rates to and from the Union Stock Yards in Chicago?

Mr. Gladson: The explanation which the witness will [fol. 745] make at this time, Mr. Examiner, will merely identify and describe the exhibits, so that we will know what they are about.

Exam. Carter: Well now, what portion of the exhibits? The part or portion dealing with the rates to and from the Union Stock Yards, or the entire group of documents?

The Witness: Perhaps I can answer that question.

Mr. Gladson: All right.

The Witness: Mr. Examiner, my narrative description of these tariffs seeks to avoid insofar as possible, any detailed conclusions or arguments, being largely directed toward identifying the item to which reference is sought to be made; and I shall not go into any exhaustive detail as to specific rates from Jonesville, or any other point, to Chicago, or vice versa; thinking that perhaps the intent of the exhibit will be better understood by merely identifying the tariffs themselves, and the schedules in those tariffs, so that those schedules may be used in the handling of the facts disclosed therein.

In other words, I have attempted to identify them with sufficient clarity, which, as I understand it from the rules of practice, is what is required.

Exam. Carter: You may proceed.

Mr. Gladson: I will ask that these documents be marked at this time collectively as Respondent's Exhibit 24.

Exam. Carter: The exhibit may be marked Respondent's Exhibit No. 24 for identification.

[fol. 746] Mr. Fulbright: If the Examiner please, did we not identify another exhibit as No. 24, a list of railroads?

Mr. Gladson: No.

The Witness: That never went in.

Exam. Carter: Counsel withdrew that.

Mr. Fulbright: I see.

Exam. Carter: He was going to offer it, but withdrew it.

Mr. Gladson: Yes, I withdrew that one for the time being.

(Respondent's Exhibit No. 24 marked for identification.)

Exam. Carter: Now, I want you gentlemen to understand that I am admitting testimony with respect to Exhibit 24, only insofar as it shows the rates to and from the Union

Stock Yards in Chicago. Other portions of the tariffs are not in evidence.

Mr. Gladson: Well, if the Examiner please, the testimony which I am going to ask Mr. Heinemann to give, is merely explanatory of the exhibit, and I suggest that you withhold your ruling on that matter until I have offered the exhibit, and until you hear argument.

Exam. Carter: I will gladly rescind my ruling if I am convinced a little later on that I am wrong. I just wanted to make it clear to you gentlemen what my idea was about this exhibit. Now, if you can show me that I am wrong, why, as I say, I will gladly rescind the ruling.

Mr. Gladson: I do not want to give any false impression to the Examiner.

[fol. 747] Exam. Carter: No.

Mr. Gladson: Now, these exhibits—or these documents in this exhibit show the manner in which rates are published to other livestock markets; and I expect later on, at some time in the proceeding, to offer the exhibit for that purpose, as well as to show the rates to Chicago.

Exam. Carter: Yes, I understood that, Mr. Gladson.

Mr. Gladson: All right.

Exam. Carter: But I just did not want to have my action in having this exhibit marked No. 24 at this time, misunderstood.

Mr. Fulbright: Permit me to make this observation, if the Examiner please, that there is quite a distinction perhaps between the general method of publishing rates to livestock markets, to show what is done here, as the general method; and the line of exhibits to which counsel has referred, going into the detailed situation of other markets. In other words, this is the kind of information we have in rate cases all the time, and I cannot possibly see how there could be any objection to it.

Exam. Carter: The only difficulty is, this is not a rate case, Mr. Fulbright.

Mr. Fulbright: Well, it will show what the general practice is with respect to the publication of the rates. That is certainly customary.

[fol. 748] The Witness: May I ask a question?

Mr. Smith: Just a moment. Is it your ruling, Mr. Examiner, that the witness' explanation of this exhibit shall be limited to dealing with the rates to and from Chicago?

Exam. Carter: Yes, that is my ruling up to the present time.

Mr. Gladson: Well, now, just a moment, Mr. Examiner.

Exam. Carter: In other words, this witness has prepared here a booklet, so to speak, of explanations of these tariffs, consisting of a number of pages,—I do not know how many pages, but from the looks of it it must consist of approximately 20 pages. Is that about correct, Mr. Heinemann,—or more?

The Witness: More.

Exam. Carter: More?

The Witness: Yes, sir.

Exam. Carter: Now, it is very difficult, of course, to know in advance what this witness is going to say, and therefore I want it clearly understood beforehand, and that is the reason why I made the observation a few moments ago, that at this time all I am going to permit to go into the record is an explanation of the tariffs publishing the rates to and from the Union Stock Yards.

Mr. Fulbright: Am I to understand from that, if the Examiner please, that the witness will not be permitted even to explain his exhibit for purposes of identification, even [fol. 749] though it should involve in some instances something else?

Exam. Carter: Let us put it this way; let the witness do what I have requested him to do, or what I have said he could do, first; and then let us take up the other situation afterward.

Mr. Gladson: Well, Mr. Examiner, I think we will save time if the witness is allowed——

Exam. Carter: Well, we all want to save time, but we might as well put it in as I have indicated. I think we will save more time that way, than otherwise.

Mr. Fulbright: Frankly, Mr. Examiner,—and I do not want to argue the question, but merely to make this observation, that if we go right ahead with it, when we reach one of those spots that have been referred to, we can more appropriately deal with it at that time. I think that we would have been well along with it, if we had started out that way.

By Exam. Carter:

Q. Can you follow the procedure which I have suggested, Mr. Heinemann?

A. Well, Mr. Examiner, of course the narrative which I have prepared here in my effort to make an explanatory description of this exhibit, may be at variance with what I understand your strict line of procedure to be. However, there will not be many instances where there will be much detail with reference to other markets, but I have referred in this narration, to certain schedules of the tariffs. Now, [fol. 750] of course, if I must stop when I come to one of those schedules, it is of course going to make it somewhat slow and laborious to put it in in that way.

Mr. Gladson: If the Examiner please, I desire to preserve an exception to the limitation upon the explanation of these exhibits,—or these documents, that have as yet been merely marked for identification.

Exam. Carter: Well, I have not imposed that limitation on you as yet. I have simply asked the witness if he could not present the testimony relating to Chicago first.

Mr. Smith: If the Examiner please, I think it is perfectly evident that the witness has quite enough text in this manuscript which he has prepared, which purports to be simply an explanation or identification of this exhibit, so that they will have in the record largely what they want in the record with reference to this situation at these other points.

Mr. Fulbright: Oh, no.

Mr. Gladson: No.

Mr. Smith: Counsel has not been willing to state as yet, and it seems to me it is not an improper request to make of counsel, that he state something more than that he thinks this will be helpful to the Commission.

I objected to it with reference to Chicago, as immaterial; and the only comment that has been made in response to that, is the general one that it is felt that it will be helpful. [fol. 751] Now it has not been shown as yet that this has the slightest materiality to this situation at Chicago, insofar as it relates to Chicago. Maybe it has, but——

Mr. Fulbright: You have not heard it yet.

Mr. Smith (Continuing): But if it has, it has not yet been stated what it can be.

Mr. Gladson: There has been nothing offered yet, Mr. Smith. I have always been under the impression that the time to object to an exhibit was when the exhibit was offered in evidence.

—Exam. Carter: Well, now, you are going to have the witness here present testimony covering approximately 20 or more pages——

Mr. Gladson: Yes.

Mr. Fulbright: To explain the exhibit.

Exam. Carter: To explain the exhibit, which you have asked be marked for identification.

Mr. Gladson: Yes.

Exam. Carter: Now, Mr. Fulbright and Mr. Heinemann say that some of the testimony relates to rates to points other than Chicago, or to tariff provisions which contain rates to points other than the Union Stock Yards at Chicago.

Mr. Gladson: Yes.

Exam. Carter: At this point, if it does relate to such matters, I propose to exclude it. However, if later on you [fol. 752] want to identify the evidence which I propose to exclude, if there be such evidence, why, we will take that question up when we get to it. But if you want to explain—and I assume that the purpose, or at least one of the purposes of this testimony, is just as you stated, to show how the line haul carriers treat the Stock Yards Company in the tariffs which they publish——

Mr. Gladson: Right.

Exam. Carter: —I am perfectly willing that you show that; but I suggest, just as I did before, that you show that now, with respect to this exhibit, and then we will take the other matter up after we have disposed of that.

Mr. Gladson: Well, if the Examiner please, in order that the record may be clear, I want to preserve an exception at this time to any limitation on our identifying these exhibits, or portions of exhibits, insofar as they relate to other yards.

Exam. Carter: Yes. Well, I am not imposing any limitation on your offer to identify. I am simply specifying the manner in which the identification shall be made; or in other words, the order of the identification. I have not said that you cannot identify the tariff provisions relating to rates to other points, points other than Chicago.

Mr. Fulbright: Let the witness start out, if the Examiner please, and let us see what happens. I am not very familiar with this myself.

Exam. Carter: Well, Mr. Heinemann has stated that [fol. 753] there are references in this memorandum which he has prepared, dealing with both situations.

Mr. Gladson: I am not sure, if the Examiner please, whether I have made myself clear as yet, or not. As I understand Mr. Heinemann's statement, he is not commenting in this statement, except possibly in a few instances,—and I think we can agree that they can go out at this time,—on rates to other markets; but he is simply showing the places——

Exam. Carter: Where such rates are found?

Mr. Gladson: —where such rates are found, yes.

Exam. Carter: Well, can he not first show the places where the rates to and from Chicago are found? I do not see why he cannot do that.

Mr. Gladson: Well, I do not know. Can you handle it in that manner, Mr. Heinemann?

The Witness: I can try.

Mr. Gladson: Proceed.

A. Terminal Tariffs at Chicago.

In order that the tariff data included in Respondent's Exhibit No. 24 for identification may be more readily followed, we have used as the first units of the tariff data exhibit the tariffs of Agent R. A. Sperry.

Unit No. 1. Agent Sperry's 22-Z I. C. C. 329.

We have included in this unit, the title page and page 100 of the tariff.

[fol. 754] The title page indicates that this tariff is a directory of industries with private or individual side tracks in the Chicago district as defined in Agent Sperry's 20-T I. C. C. 242 * * * supplements thereto and reissues thereof.

Page 100 lists the Union Stock Yards and Transit Company as an "Industry" operating stock yards in the seven described locations in the districts of the terminal carrier shown as the C. J.

This tariff is referred to by specific or general reference through cross indexing of the livestock tariffs of all Chicago lines.

Unit No. 2. Agent Sperry's 20-U I. C. C. 339.

We have included in this unit, the title page and pages 3, 6, 16, 18, 19, 20, 21, 22, 23, and 24 of the original tariff

and the title page and pages 3, 9, 10 and 11 of Supplement No. 13 to the tariff.

The title page indicates that the tariff names local and joint terminal charges, rules and regulations from or to points within the Chicago district.

Page 3 shows the list of concurring carriers, and lists each of the twenty-two Chicago Trunk Lines plus the Chicago Junction Railway, its lessee, The Chicago River and Indiana Railroad Company, and the owner of the lessee company—the New York Central Railroad Company. The respondent is not shown as a concurring carrier.

[fol. 755] In every case the concurrence was given under the form FX-1 as power of attorney, as prescribed in the Commission's Tariff Circular No. 20.

I might interpolate right here to explain that form FX-1 is the more general power of attorney, as distinguished from the limited concurrence forms in the Commission's Tariff Circular.

Page 6, in the list of stations, at index No. 1490 lists the Union Stock Yards as a "station" on the C. J.

Page 16 for the Alton and Santa Fe.

Page 18 for the Chicago & Eastern Illinois.

Page 19 for the Chicago & North Western.

Page 20 for the Chicago, Burlington & Quincy and Chicago Great Western.

Page 21 for the Chicago, Milwaukee, St. Paul & Pacific.

Page 22 for the Chicago, Rock Island & Pacific.

Page 23 for the Illinois Central Railroad.

Page 24 for the Minneapolis, St. Paul & Sault Ste. Marie.

Provide in each case that on livestock between points outside the Chicago district and points within the Chicago district the combination of rates will apply except to the Omaha Packing Company and as provided in paragraph 2, section A of Item No. 5, and in Rate Base No. 6.

Page 27 for the Wabash makes a similar provision for that company on shipments to or from territory "B"—the Western Territory.

[fol. 756] Supplement 13 on page 3, carries amended schedule on Chicago, Milwaukee, St. Paul & Pacific exceptions, but these made no change on livestock.

Supplement 13, pages 9, 10 and 11 contain Rate Basis No. 6 and exceptions thereto. It will be observed that each of the 22 road haul lines reaching Chicago is in the list of

carriers. On carloads of livestock inbound and outbound, the item shows that Rate Basis No. 5, Chicago rates——

By Mr. Gladson:

Q. That should be No. 3, should it not, Mr. Heinemann?

A. No, sir; that is a typographical error. It should be No. 5.

— plus the amounts opposite each railroad applies subject to Note 1. Note 1 sets out the exception to the use of the amount to be added. As indicated in this Note 1, no amounts are to be added on outbound carloads via Eastern lines, and generally $1.35 on inbound carloads via Eastern Lines. $2.70 is to be added on Illinois intrastate traffic, and nothing is to be added on carloads to or from Wisconsin and points in states west of the Mississippi River or the upper peninsula of Michigan.

I might interpolate at this point that St. Louis, Missouri, rates are an exception, to points west of the Mississippi River.

This unit is dealt with in more detail than will be given in connection with other units for all live stock traffic to or from the Union Stock Yards in Chicago will be handled [fol. 757] on rates from tariffs which lead directly to Agent Spefry's No. 20-U I. C. C. 339.

I might add right there, Mr. Examiner, that Agent Sperry's tariff 20-V, I. C. C. No. 365, issued June 3, 1937, to become effective July 6, 1937, is in my possession; but inasmuch as the tariff was not effective, I simply used the effective tariff. There will be no change made in the rate base, so far as rate base 6, referring to rate basis No. 5 is concerned.

Unit No. 3. The Alton Railroad Company.

We preface the tariff data of this carrier with a map showing the territory traversed by this railroad. Although this map includes The Alton Railroad and also the Baltimore & Ohio Railroad it will be understood that the Alton line is that line running between Chicago and St. Louis as well as the lines west thereof except the Baltimore & Ohio line, Beardstown to Springfield. The Alton section also has included the line of the Burlington, St. Louis to Mexico, Missouri, used for joint operations of certain trains of the two companies.

Alton Railroad tariff 1875a I. C. C. No. 56 is the first tariff of this unit. The title page is reproduced showing it

contains livestock rates between Chicago, Peoria, East St. Louis, Springfield, St. Louis and Milwaukee, Wisconsin, on the one hand, and stations in Missouri and Kansas.

Page 11 is reproduced to show Item 50, which makes shipments to or from Chicago subject to Agent Galligan's Tariff 20-S, I. C. C. 182, or successive issues.

[fol. 758] I will interpolate there to explain that Agent Galligan was the predecessor of Agent Sperry.

Page 13 is reproduced to show Item 95 which is the omnibus cross reference schedule.

Alton Railroad Tariff 28-H, I. C. C. 95, is the third tariff of this unit. The title page is reproduced to show that it contains various rules and regulations, including the rule on absorption of loading or unloading charges on live stock.

On the same page is Item 140, in which the Alton Railroad charges 2½ cents per 100 for unloading and delivering carload freight through its freight house at Chicago.

Unit No. 4. The Aichison, Topeka & Santa Fe Railway Company

We preface the tariff data of this company with a map showing the territory served, and the principal livestock markets reached.

Unit No. 4 consists of three tariffs of the Aichison, Topeka & Santa Fe Railway Company, which we consider representative of the tariffs of that company which includes rates on livestock.

By Mr. Gladson:

Q. You are using the editorial "We", are you, Mr. Heinemann?

A. Yes, sir.

Santa Fe Tariff 14867, I. C. C. 12105, contains rates between points in Colorado and Kansas, including also Kan-

[fol. 759] sas City and St. Joseph, Missouri, and Superior, Nebraska, and points in Colorado, Iowa, Illinois, Kansas, Minnesota, Missouri and Nebraska. The first sheet is the title page, and shows that the rates therein are governed by the Western Classification and by Agent Boyd's I. C. C. A-2230 and Santa Fe Circular 2240-E I. C. C. 10951, and supplements thereto and reissues thereof.

Page 10, also reproduced, shows in Item 30 that Chicago rates apply as provided in Agent Galligan's Tariff 20-S, I. C. C. 182. This now is Agent Sperry's 20-U reproduced in Unit No. 2. Item 355 on this page is of such im-

portance in getting a proper understanding of the method used by the Santa Fe that I shall read it into the record. It reads:

"The live stock station and stock yards of the Aichison, Topeka & Santa Fe Railway in Chicago are located at Corwith, and the rates named herein as applicable to Chicago only apply to live stock intended for delivery at the stock yards of said company at Corwith in said city.

"Upon all livestock consigned to the Union Stock Yards in Chicago, or to industries located on the Chicago Junction Railway, and transported and delivered to said Union Stock Yards, or to said industries located on the Chicago Junction Railway, aforesaid, an addition charge"—that is the way it reads in the tariff—"as provided in 'Santa Fe' tariff No. 11196-R, Agent C. W. Galligan's Tariff No. 20-S, I. C. C. No. 182, will be added to the rates applicable to Corwith for transporting such cars to said Union Stock Yards, or [fol. 760] to said industries on the Chicago Junction Railway, for delivery thereat.

"The attention of the shippers must be and is called to the fact that the transportation charge on livestock delivered at our yards at Corwith in Chicago will be less than when delivered at the Union Stock Yards at Chicago, or at industries located on the Chicago Junction Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The livestock contract must then be filled out so as to show the correct destination and rate, as provided by this tariff.

"Care must also be taken to have the stock correctly billed, either to Corwith in Chicago, or Union Stock Yards at Chicago or industries located on the Chicago Junction Railway, as designated by the shipper, and the correct rate shown in the billing.

"Bills of lading covering freight to and from the Union Stock Yards, or industries located on the Chicago Junction Railway, must provide for the above terminal charges.

"In waybilling shipments destined to or coming from the Union Stock Yards, etcetera, the terminal charges, if any, must be shown separately in the freight column."

Page 18 is reproduced to show the manner in which the Santa Fe sets out the grouping of stations which include the more important western markets to and from which rates are named in this tariff. I call attention to their [fol. 761] listing of Chicago with a reference to a circled

(1), and that circled (1) refers to Item No. 30, which I have covered.

Santa Fe Tariff 14872-A, I. C. C. 12432, is the second tariff of Unit No. 4. The first sheet is the title page and this shows that the tariff contains rates on livestock carloads, between Chicago, Peoria, Mississippi River crossings named, Kansas City, St. Joseph, Atchison and Leavenworth, Kansas and points in Illinois, Iowa and Missouri. As shown on the title page this tariff is governed by Santa Fe Circular 2240-F I. C. C. 12291, now 2240-G, I. C. C. 12552.

Points in Chicago district will take rates provided in Agent Sperry's 20-T, already covered by me under Current Tariff 20-U.

Page 8, in Item No. 110, covers substantially the same provision as that which I read from Santa Fe tariff 14867, I. C. C. No. 12105, in discussing the Santa Fe facilities at Corwith.

I might explain that Corwith, on the Santa Fe, is a section of Chicago near the intersection of 47th Street and Archer Avenue where the Santa Chicago Freight break up yards are located.

Santa Fe Circular 2240-G, I. C. C. 12552 is the third section of this Unit No. 4. The reproduced title page shows it contains rules and instructions governing the transportation of livestock.

Page 22 is reproduced for the purpose of showing the Santa Fe's definition of a "Suitable Pen", this being that: "The term 'suitable pen' is understood to mean a pen into [fol. 762] or from which ordinary livestock is unloaded or loaded directly from or to the car." This is in Item 270.

The title page and Page 3 of Supplement 8 to this circular are reproduced. Item 265a lists the public stock yards included by the Santa Fe under its definition of public stock yards.

The two tariffs of the Santa Fe used as typical of that company's tariffs do not cover rates from Santa stations in Oklahoma, Texas, New Mexico and west thereof. These generally will be found in agency tariffs later to be covered.

Unit No. 5. The Baltimore & Ohio Railroad Company. We preface the tariff data of this company with a map of The Baltimore & Ohio Railroad. Although the map includes the lineup of the Alton Railroad, it will be understood that the Baltimore & Ohio line includes the lines shown

east of Springfield and St. Louis, plus the short line from Beardstown to Springfield, Illinois.

The map shows in added circles the more important live-stock markets served by this company.

By Mr. Gladson:

Q. What unit is that, Mr. Heinemann?

A. Pardon?

Q. What unit is that?

A. Unit No. 5.

Q. We have the C. & O. here.

A. That is unit No. 5. No. 6 is the C. & O.

[fol. 763] Baltimore & Ohio Railroad tariff H-3370-F I. C. C. W. L. 10235 is the first tariff of this unit. The title page is reproduced to show it contains rates between Baltimore & Ohio stations and points in Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia and Wisconsin.

Page 3 is reproduced to show the concurrence of the C. J. Ry. and its lessee, the C. R. & I. R. R. Co.

Page 17 is reproduced to show item 20 showing the application of routing via Chicago.

Page 20 is reproduced to show Rule 135, which is the omnibus cross reference section.

Q. Mr. Heinemann, you say that page 3 is reproduced to show the concurrence of the C. J. Ry. and its lessee.

A. Yes, sir.

Q. Is that the way it reads?

A. Yes, sir. It is photostated there, Mr. Gladson, if you wish to see it.

Q. Is the word "company" included?

A. No, sir.

Q. What is the C. J. Railway?

A. That is simply a name applied to the property, the railroad property, formerly operated by the Chicago Junction Railway in part.

Q. It is a trade name?

[fol. 764] A. That is right. The exact reading of the concurrence provision is: "C. J. Railway. Name of road: Chicago Junction Railway (The Chicago River & Indiana Railroad Company lessee); concurrence, form FX-5; C. J.-4."

Q. Proceed.

A. Unit No. 6. The Chesapeake & Ohio Railway Company.

We preface our tariff data on this line with a map of the Cheaspeake & Ohio Railway showing the territory served and the more important posted public livestock markets reached.

The Chesapeake & Ohio Railway tariff 1245-G, I. C. C. 11487 is the first tariff of this unit. The title page is reproduced to show it contains rates on livestock from Chesapeake & Ohio Railway stations to points in Central Freight Association territory and Ontario, Canada.

Page 15 is reproduced to show rule 5, which is the omnibus cross reference schedule.

Chesapeake & Ohio Railway tariff T-157-G, I. C. C. 11837, is the second tariff of this unit. The title page is reproduced to show it contains rules and charges for the handling of livestock.

Page 2 is reproduced to show the table of contents.

Page 3 is reproduced to show rule 4, covering the loading and unloading of livestock.

Page 4 is reproduced to show rule 11 defining "ordinary livestock", and rule 12, defining "suitable pens".

[fol. 765] Unit No. 7.. Chicago & Eastern Illinois Railway Company.

We preface the tariff data of this company with a map of this railroad. This shows the territory served, the various termini and the three important posted public markets reached.

Only Chicago & Eastern Illinois Railway tariff 780-B, I. C. C. No. 309, has been used. The title page of the tariff is reproduced. This shows it contains rates on livestock from stations on the Chicago & Eastern Illinois Railway to points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia and Wisconsin.

The title page shows the tariff is governed by the Official Classification and exceptions thereto published by Agent B. T. Jones in his 130-T, I. C. C. No. 2248, supplements thereto and successive issues thereof. Page 13 is reproduced to show the method used by this carrier in publishing rates from its stations to Chicago.

The title page of supplement No. 9 is reproduced as are pages 4 and 9 of that supplement. Item 8, page 4, shows

reference to Agent Galligan's 20-T, I. C. C. No. 242, which now is Agent Sperry's 20-U, I. C. C. No. 339. This is the cross reference to bring this latter tariff into its proper connection. Page 9 of supplement 4, sets out the mileage rate to be used in the absence of specific rates.

This tariff does not cover rates to Eastern Trunk Line, which are carried in Agent B. T. Jones' tariffs to be later described.

[fol. 766] Unit No. 8. Chicago & Erie Railroad Company.

We preface our tariff data on this railroad with a map of the Erie Railroad System, of which it is a part. This shows the territory traversed and circles the more important livestock markets served by it. The Erie units appear in each instance to refer to points other than Chicago, so they are omitted, other than what has just been stated.

Unit No. 9. Chicago & North Western Railway System.

We preface our tariff data on this railroad with a map of the North Western System. Obviously this includes both the Chicago & North Western Railway and the C. St. P., M. & O. Railway. As shown on this map, the mileage of the Chicago & North Western Railway is over five times that of the C. St. P., M. & O. Railway. This map also circles the more important livestock market points reached by this system.

Chicago & North Western Tariff No. 16907, I. C. C. No. 10177, is the first tariff used in these data. It applies between Chicago, Milwaukee, Omaha, St. Louis, St. Paul, Sioux City and other stations named, and stations in Illinois, Michigan and Wisconsin, also Duluth, Minnesota. The title page is reproduced showing it is governed by the Western Classification, and by Agent Boyd'*d* Exceptions 236 I. C. C. A-2230, or successive issues. This now is Agent Kipp's Exceptions to be later referred to.

Page 8 is reproduced to show item 5 covering the general application of rates from intermediate points.

[fol. 767] Page 9 is reproduced to show item 65 covering the application of rates to the Union Stock Yards in Chicago showing that rates to and from Chicago are to be applied as shown in Agent Galligan's I. C. C. No. 182, or successive issues.

Supplement 31 title page and page 2 thereof are reproduced. This is to set out item 15C covering the general cross reference to Terminal Charges, etcetera, and item 35D

showing the general application of the rates are governed by Agent L. E. Kipp's I. C. C. A2512 or successive issues.

Chicago & North Western tariff No. 1690-A, I. C. C. 10484, is the second tariff used in this unit. It applies between Chicago, Milwaukee, Omaha, St. Louis, St. Paul, Sioux City, and other stations and stations in Iowa, Minnesota, North Dakota, east of the Missouri River; also named Nebraska stations.

The title page is reproduced and shows it is governed by the Western Classification and by rules and regulations shown in Agent L. E. Kipp's 236-E, I. C. C. 2512.

Page 7 is reproduced to show item 10, the intermediate rule, item No. 20, the general terminal cross reference, and item 40, showing the general application of the rates.

Page 8 is reproduced to show item 70 which shows that rates to and from Chicago are governed by Agent Sperry's 20-T I. C. C. No. 242, now his 20-U, I. C. C. 339.

Supplement 3 to Chicago & North Western 10548 is used in lieu of the original tariff. The title page is reproduced and [fol. 768] shows that the tariff is governed by Western Classification, and by Agent Kipp's rules and regulations, published in his 236-C, I. C. C. No. A-2687 or succeeding issues. The tariff and supplements contain livestock rates between stations on the Northwestern System west of the Missouri River in Nebraska, Wyoming, and South Dakota and Chicago, Milwaukee, Omaha, St. Louis, St. Paul, Sioux City and other points named.

Page 2 of supplement 3 is reproduced to show item 10a, covering the intermediate rule and item 20a, to show the general cross reference to terminal tariffs.

Page 3 of supplement 3 is reproduced to show item 20a, showing that Agent Sperry's I. C. C. 242 governs the application of rates to and from Chicago.

Unit No. 10. Chicago, Burlington & Quincy Railroad.

We preface our tariff data on this railroad with a map of the Burlington route showing the territory served and with a circled marking of the principal livestock markets served by this system. The lines shown include the Chicago, Burlington & Quincy Railroad and its subsidiary lines in Colorado and Texas.

Chicago, Burlington & Quincy Railroad tariff 3652-W, I. C. C. 18815 is the first tariff of this unit. It is used first because it is, as shown on its reproduced title page, a tariff

containing rules and regulations governing livestock traffic. Moreover, the other Chicago, Burlington & Quincy livestock tariffs we refer to will be governed by it.

[fol. 769] Page 20 is reproduced to show item 320, which lists the yards where livestock may be fed or watered. In the list are a number of posted public markets.

Page 21 is reproduced to show items 350, 355, 360 and 365, which refer to livestock deliveries in the Chicago district.

Page 39 is reproduced to show item 610, which covers loading and unloading at stations without facilities.

Page 42 is reproduced to show items 635, 640, and 645 which refer to handling at various stock yards.

Supplement 5 is also reproduced in part by including the title page and the following pages:

By Mr. Smith:

Q. You had better mark page 42, Mr. Heinemann. Is that separated, in this list?

Mr. Gladson: Does that cover Chicago?

A. That covers the livestock loading, unloading, feeding, watering and switching. In the general proposition, item 640 covers railroad-operated stock yards, and item 645 shows a list of cities where public stock yards are situated, including Chicago.

By Mr. Gladson:

Q. Well, do the rules and regulations shown on that page relate to Chicago?

A. Yes, sir. This rule up here would apply to the Burlington yard at Hawthorne, where fed; and this rule here would apply to "When fed" at the Union Stock Yards.

Mr. Smith: Then there is an illustration of a page that [fol. 770] will cover both Chicago and other points.

Exam. Carter: Well, I made the ruling before, or at least I made the tentative ruling, that the only thing to be considered in evidence—for instance, let us take that particular page as an illustration—is the data on that page relating to the transportation of livestock to and from Chicago.

Mr. Gladson: Well, Mr. Examiner, we have not reached that stage yet, have we?

Exam. Carter: Well, I know, but you are going to reach that stage.

Mr. Gladson: We are going to reach it.

Exam. Carter: Yes.

Mr. Gladson: But I want to be heard before you make rulings, even tentative ones. I think I am entitled to be heard.

Exam. Carter: I will rescind my ruling if you change my mind, but I just want to make it clear, because of this procedure that we are going through here.

Mr. Gladson: Well, Mr. Examiner, I have had a slight inkling of what was running through your mind, as to your final ruling.

Exam. Carter: Well, I think perhaps I have given that to you, but I have done it intentionally, because I consider that the Commission has ruled on the general proposition already.

[fol. 771] Mr. Gladson: Well, I am very sorry to be put in the position, when I come finally to offering this testimony, of having the burden of changing your mind.

Exam. Carter: I did not say you had the burden of changing my mind, Mr. Gladson; I said that I made this tentative ruling, so that we will understand where we are going. If you can show me later, when you make the offer of the testimony, that I am wrong, my final ruling may not necessarily be this one. That is the thought that I am trying to convey to you. Perhaps I have not made it clear, although I think it probably is clear enough to you, if you want to understand it.

Mr. Gladson: Well, yes, I think it is quite clear, Mr. Examiner. Go ahead, Mr. Heinemann.

A. Page 8 of supplement 5 is reproduced to show item 615a, which specifically covers loading and unloading at the stock yards listed.

Page 9 of supplement 9 is reproduced to show item 650a, lists the public stock yards and public livestock markets.

Chicago, Burlington & Quincy tariff 2582 Q, I. C. C. 18579 is the third tariff of this unit. The title page is reproduced to show it contains livestock rates between Chicago, Peoria, Rockford, St. Louis, St. Paul, South St. Paul, Minneapolis, Minnesota Transfer, and Mississippi River Points and stations in Iowa, Missouri and Kansas, also Atchison, Leavenworth, Nebraska City, Omaha and South Omaha.

[fol. 772] It is governed by Chicago, Burlington & Quincy Circular 2652 T. I. C. C. 18260, or successive issues.

Page 2 is reproduced to show the participating carriers and that no stock yard or stock yard terminal railway concurs.

Pages 2, 3, 4, 5, 6 and 7 are reproduced to show the complete index.

Page 11 is introduced to show item 100, which is the omnibus cross reference schedule and item 128, which specifically refers to the Chicago, Burlington & Quincy Circular for instructions on Chicago deliveries.

Chicago, Burlington & Quincy Railroad tariff 17800 K -I. C. C. 18713 is the fourth tariff of the unit. The title page shows it is a distance rate tariff governed by Chicago, Burlington & Quincy 3652 U, I. C. C. 18560, or successive issues.

Page 3 is reproduced to show item 20, the omnibus cross reference schedule.

Chicago, Burlington & Quincy Railroad tariff 3298-M, I. C. C. 18757 is the fifth tariff of this unit. Its title page is reproduced showing it contains rates on livestock between Chicago, East St. Louis, Peoria, Rockford and St. Louis, and stations in Illinois and Mississippi River stations in Iowa. It is governed by Chicago, Burlington & Quincy 3652 U, I. C. C. 18560, or successive issues.

Page 15 is reproduced to show item 210, which is the omnibus cross reference schedule.

[fol. 773] Chicago, Burlington & Quincy Tariff 17751 D, I. C. C. 18871 is the seventh tariff in this unit. The title page is reproduced to show it contains rates on livestock between Chicago, East St. Louis, Peoria, Rockford and St. Louis and points in Illinois and Iowa as named.

It is governed by Chicago, Burlington & Quincy 3652 W, I. C. C. 18815.

Page 7 is reproduced to show item 60, which is the omnibus cross reference schedule.

Chicago, Burlington & Quincy Tariff 4636-P, I. C. C. 18877 is the eighth tariff in this unit. The title page is reproduced to show it contains rates on livestock between points in Wisconsin and Minnesota, and Chicago, Peoria, Rockford, St. Louis, St. Paul, South St. Paul, Minneapolis, Minnesota Transfer, Milwaukee and other points listed. It is governed by Chicago, Burlington & Quincy 3652-W, I. C. C. 18815.

Page 10 is reproduced to show item 140, which is the omnibus cross reference section.

Chicago, Burlington & Quincy Railroad Tariff 18935-H, I. C. C. 18824, is the ninth tariff in this unit. The title page is reproduced to show it contains rules on pick-up service on livestock in the territory shown. It is governed by Chicago, Burlington & Quincy 3652-W, I. C. C. 18815.

Pages 2 and 3 are reproduced to show the complete rules.

Supplement 1 is reproduced to show the extension of the [fol. 774] life of the tariff.

It will be observed that no other carriers concur in this tariff. Also that the rates apply from the farms with an arrangement to pay for haulage to the railroad facilities, and that the tariff applies to Chicago, Illinois, and the Union Stock Yards.

In connection with Chicago, Burlington & Quincy tariff 3652-W, I. C. C. No. 18815, I think it essential that specific reference be made, and that the wording of items No. 350 and No. 355 be read into the record, because they refer specifically to shipments to respondent.

Mr. Smith: Do you want it in the record twice? So far as the Chicago references are concerned, my objection has been tentatively overruled at least, and it appears that they are going in. Now, do you want them in twice; in the exhibit, and in the transcript also?

Mr. Gladson: Well, what he is doing goes a little beyond merely identifying the exhibit, but I think it would be easier for all of us if the particular portions referred to were fully set out. I think probably the wishes of the Examiner should be consulted in the matter.

Exam. Carter: It is not a very long reference, is it?

The Witness: No, sir.

Exam. Carter: You may read it, for convenience.

The Witness: Chicago, Burlington & Quincy, G. F. O. No. 3652-W, I. C. C. No. 18815; item 350: "Live Stock Destined [fol. 775] to Chicago or to the Union Stock Yards.

"Live Stock that is to be unloaded in C. B. & Q. R. R. chutes or barns of commission houses at the Union Stock Yards, should be billed to 'U. S. Yards, Ill.,' but if for Chicago, proper, and not to go to Union Stock Yards, it should be billed 'Chicago, Ill.'

"In Case Delivery Is Desired in the Union Stock Yards District, Chicago, or shipments are made therefrom, a terminal charge as provided for in Freight Tariff No. 20-U, Agent R. A. Sperry's I. C. C. No. 339, C. B. & Q. G. F. O.

No. 7000-W (See Item 360 herein on shipments for beyond Chicago), will be made for that service, which will be added to the rates published to and from Chicago in tariffs lawfully on file with the Interstate Commerce Commission.

"Agents in issuing livestock contracts for shipments destined to or from Union Stock Yards District must insert the terminal charge in the livestock contract, in addition to the rate to and from Chicago."

Now, under the same identifying reference, item No. 355:

"Live Stock Destined to Chicago. (See Item 27.)

"There are unloading platforms on C. B. & Q. R. R. tracks at Harrison and Canal Streets and at Clyde, unless otherwise specified. Stock for immediate delivery from cars to consignees in 'Chicago' will be unloaded at Harrison and Canal Streets. Stock not to be taken away by shipper [fol. 776] directly from cars and not designated for delivery to Union Stock Yards, or other specified place of unloading, will be unloaded at C. B. & Q. R. R.'s Stock Yards at Clyde. If the shipper has any choice as to place of unloading, agent must show in the consignee and destination column of waybill the platform at which he wishes the car set.

"Shipper so desiring may have his stock Delivered on Tracks of Other Railroads in Chicago, to be unloaded at any of their Chicago platforms, provided arrangements to accept it have been previously made by the shipper with some official of the railroad to which delivery is to be made. This delivery, however, will necessitate the prepayment of freight charges, as per tariffs lawfully on file with the Interstate Commerce Commission, as connecting lines will not accept Stock which is destined to Chicago proper unless such charges have been prepaid."

On the same page, under the same identifying reference, item No. 365, entitled, "Live Stock Destined to Chicago or to the Union Stock Yards, or to Points Beyond."

"The C. B. & Q. R. R. has excellent Private Stock Yards at Clyde, Cook County, Ill., adjoining the main in-bound freight yard. Shippers having Stock destined beyond Chicago, who may desire to unload and feed there may do so without cost for yardage or charge for switching to the connecting line when it has been reloaded. There are no facilities, however, for loading or unloading double-deck cars or [fol. 777] for feeding or watering Hogs. Way-bills for Stock intended to be unloaded at this yard should carry a notation reading, 'To be unloaded at Clyde Stock Yards.'

Hay and Grain can be procured at these yards at reasonable rates.

"By being careful to observe the above instructions, Agents can give shipper much information which will be of service to him."

Now, just before I leave that unit, Mr. Examiner, I want to add that the Burlington Railroad makes delivery of a very considerable volume of livestock to the Omaha Packing Company, which operates a stock yard in conjunction with its packing house, or what was formerly operated as a slaughtering packing house, on the Chicago River at Halsted Street, on the south branch of the Chicago River. All of such stock brought into Chicago must be switched to that plant when consigned to the Omaha Packing Company, by the facilities of the Burlington Railroad; and that, as I have said, is a place where a very considerable volume of livestock is delivered during the course of a year. On shipments destined to those points, the Burlington Railroad, under the divisional arrangements existing, under the reciprocal switching arrangement in Chicago, obtains an allowance of $12 per car out of the through rate applying to Chicago.

Mr. Gladson: Mr. Heinemann, have you any figures showing the——

[fol. 778] By Exam. Carter:

Q. Pardon me, Mr. Heinemann, but the plant to which you refer is not a public market, is it?

A. Not as such, Mr. Examiner, although they do buy what I would call a very large volume of stock there; but it is not a posted public market. I think that perhaps most correctly answers your question.

Q. There are no commission firms operating at the Omaha Packing Company plant, are there?

A. That is true.

Exam. Carter: Proceed.

By Mr. Gladson:

Q. Mr. Heinemann, do you happen to know the volume of business handled through that plant?

A. As I recall it, Mr. Gladson, there were something like right around one million hogs that went through there last year.

Q. And that was in addition to other animals, I take it?
A. Yes, sir.

By Exr n. Carter:

Q. Is the Omaha Packing Company an affiliate of Swift & Company?

A. Yes, sir. I might add that none of these animals now are slaughtered at that point, but they are all transported by truck from that point to the killing plant in the Union Stock Yards district.

Unit No. 11, Chicago Great Western Railroad Company.

We preface our tariff data on this railroad with a map of [fol. 779] its lines. This map shows the territory served, and marked thereon with a circle are the principal live stock markets served.

Chicago Great Western Railroad Tariff 91-H, I. C. C. 5336 is used as a representative tariff. The title page is reproduced to show it contains rates on live stock between stations on the Chicago Great Western and connecting lines shown, and Chicago, East Dubuque, St. Paul, Minneapolis, Omaha, Kansas City, St. Joseph, St. Louis, and other points named.

It is governed by Western Classification and by Rules and Conditions of Agent Boyd's 236-B, I. C. C. a2347, or successive issues.

Page 10 is reproduced to show that shipments to or from Chicago are subject to Agent Galligan's tariff 20-T, I. C. C. 242. This now is Agent Sperry's 20-U, I. C. C. 339.

Page 16 is reproduced to show their method of stating the rate bases.

Unit No. 12, Chicago, Indianapolis & Louisville Railway Company.

We preface our tariff data on this line with a map of this railroad showing the territory served and with the principal markets served by it marked with circles. This map also includes the line of the Baltimore & Ohio Railroad between Indianapolis and Cincinnati, but we have disregarded it because it has already been included in the Baltimore & Ohio data.

[fol. 780] Chicago, Indianapolis & Louisville Railway tariff 1055-E, I. C. C. 4448, is the tariff treated as representative of this railroad. The title page is reproduced and shows the tariff contains livestock rates from Chicago, In-

dianapolis & Louisville stations to Central Freight Association points, as well as mileage rates.

It is governed by Official Classification and Agent B. T. Jones' Exceptions I. C. C. 2248.

Page 3 is reproduced to show the Chicago Junction Railway and its lessee, the C. R. & I. R. R. concur in the tariff. There again the C. J. Railway is a trade name; not the C. J. Railway Company.

Page 8 is reproduced to show note 5 which makes rates from or to Chicago subject to Agent Galligan's tariff 20-S, I. C. C. 182 or successive issues.

Page 11 is reproduced to show their method of setting out the rates.

Unit No. 13: Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

We preface our tariff data on this railroad with a map of this railroad showing the territory served by its lines. The principal livestock markets reached by it have been marked with a circle.

Chicago, Milwaukee, St. Paul & Pacific Railroad tariff 17010-B, I. C. C. B6526 is used as the representative tariff. [fol. 781] The title page is reproduced showing the absence of reference to any other governing tariffs. This shows that the tariff contains rates between stations on the Chicago, Milwaukee, St. Paul & Pacific Railroad, Butte, Anaconda & Pacific Railway, White Sulphur Springs & Yellowstone Park Railway, and numerous points including the market cities of Chicago, East St. Louis, Kansas City, Milwaukee, National Stock Yards, Omaha, Peoria, St. Joseph, St. Louis, St. Paul, Sioux City, Sioux Falls and West Farto, or points taking the same rates.

Page 9 is reproduced to show item 70 carrying the omnibus reference to other tariffs.

Page 10 is reproduced to show item 130, which covers the application of rates to and from Chicago. This is brief and reads as follows:

"The rails of the Chicago, Milwaukee, St. Paul & Pacific Railroad do not reach Union Stock Yards, Chicago, Illinois, and rates to or from Union Stock Yards, Chicago, Illinois, will be in accordance with provisions of C. W. Galligan's tariff No. 20-T, I. C. C. No. 242, Chicago, Milwaukee, St. Paul & Pacific G. F. D. No. 10500-U.

Of course, Agent Galligan's tariff is now Agent Sperry's tariff 20-U, I. C. C. 339.

Supplement No. 17 to tariff 17010 B, I. C. C. b 6526 is also used. The title page is reproduced to follow the general application.

[fol. 782] Pages 8 and 9 of supplement 17 are reproduced to show the following items:

Item 250a, showing the explanation of the terms "Public Stock Yards, Public Live Stock Markets," and "List of public Live Stock Market Points."

Section 1 of item 250 brings within the description of public live stock markets, those markets falling within the group posted under the Packers & Stock Yards Act.

Section 2 of item 250a gives a list of stock yards cities where posted yards are located.

Section 3 of item 250a lists certain points located as "stations" in the same district as the points listed in section 2.

Page 9 also includes item 3330 D, which shows the Chicago, Milwaukee, St. Paul & Pacific rule onloading and unloading livestock at certain markets served by it.

Chicago, Milwaukee, St. Paul & Pacific tariff 17009 B, I. C. C. 6612 is used as a second representative tariff. It includes rates between stations in Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, South Dakota and Wisconsin and Chicago, Kansas City, Milwaukee, Omaha, St. Joseph, St. Louis, St. Paul, Sioux City and other points.

The title page is reproduced to show the general application and that it is governed by Western Classification and by Exceptions published in Agent L. E. Kipp's 207-E, [fol. 783] I. C. C. a2504, and by rules and regulations published in L. E. Kipp's I. C. C. a2512, or succeeding issues.

Page 12 is reproduced showing that Union Stock Yards, Chicago, Illinois, is indexed as a station from and to which rates apply, such application being that provided in item No. 50.

Page 13 is reproduced to show item 1, which lists certain stations and prescribes the rates to apply. The stations or the basis to be used are market points.

Page 14 is reproduced to show item 50 rates to or from Chicago Union Stock Yards. This shows reference to Agent Sperry's 20-T, I. C. C. 242 for such application.

Unit No. 14: The Chicago, Rock Island & Pacific Railroad Company.

We preface the tariff data of this carrier with a map of the Rock Island Lines. This includes the Chicago, Rock Island & Pacific Railroad Company, as well as its Texas subsidiaries.

Chicago, Rock Island & Pacific Railroad tariff 18400 L I. C. C. 12586 is the first tariff in this unit. This contains rules, regulations and charges governing the handling of livestock, and it governs other tariffs of the company when reference is made thereto.

The title page is reproduced so as to indicate its scope.

Page 3 is reproduced to show item 10, which defines the application of the tariff, and item 60 covering the omnibus [fol. 784] reference to terminal and other tariffs.

Page 10 is reproduced to show item 520, which defines and governs delivery to the Union Stock Yards at Chicago, as well as to the Burr Oak Yards. This is brief and I shall read it:

"Burr Oak, Illinois, Stock Yards, Chicago, Illinois.

"This company's rails do not reach the Union Stock Yards, Chicago. The stock yards of this company in Chicago are located at Burr Oak, Illinois, and the Chicago rates cover transportation charges between the stations named and Burr Oak, Illinois stock yards.

Agents must see that shipments are way-billed to the Union Stock Yards, Chicago, or to Burr Oak, Illinois stock yards, as directed by shipper."

"Union Stock Yards, Chicago, Illinois.

"On all carload shipments of freight to or from Chicago, Illinois, received from or destined to industries located on the tracks of the Chicago Junction Railway, Union Stock Yards and State Line Divisions, charge in accordance with Illinois Freight Association freight tariff 20-T, R. A. Sperry's I. C. C. No. 242, Illinois Commerce Commission No. 110, Chicago, Rock Island & Pacific No. 28289-series, will be made in addition to the regular tariff rates.

"This charge must, in all cases, be added to the through charge and must be shown separately on the waybill in freight charge column, as a terminal expense; it must also [fol. 785] be provided for and shown in live stock contracts and bills of lading.

"All shipments for the Union Stock Yards, Chicago, must be accompanied by regular waybill in addition to such time car bills as may be required to accompany the cars.

"Agents must see that this order is strictly adhered to at all times."

Chicago, Rock Island & Pacific Railway 33750 B, I. C. C. 12534 is the next tariff used as representative. The title page is reproduced and used showing it contains rates on livestock between stations in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska and South Dakota and various cities including the livestock markets of Chicago, East St. Louis, Kansas City, National Stock Yards, Omaha, Peoria, St. Joseph, St. Louis, St. Paul, Sioux City, Sioux Falls, South St. Joseph, and South St. Paul.

The tariff is governed by Western Classification and rules and regulations in Agent L. E. Kipp's I. C. C. No. 2375, or successive issues.

Page 7 is reproduced to show item 60 covering the omnibus cross reference to other tariffs and item No. 90, showing cross reference to Rock Island tariff 18400 K, I. C. C. C 12523, now 18400 L, I. C. C. 12586, referred to above.

Rock Island tariff 33751 C, I. C. C. C 12637, is the next tariff treated as representative. The title page is reproduced showing that it contains rates between points in Colo- [fol. 786] rado, Kansas and Nebraska and various cities, including the livestock market cities of Chicago, Denver, East St. Louis, Kansas City, Omaha, Peoria, St. Joseph, St. Louis, South St. Paul, and Wichita Union Stock Yards.

It shows that the tariff is governed by Western Classification and by Agent Kipp's 236 G, I. C. C. a2687, or successive issues thereof.

Page 5 is reproduced to show their method of listing stations and showing what rates apply thereto.

Page 17 is reproduced to show item 140, which makes cross reference to Rock Island tariff 18400 L, I. C. C. 12586, or successive issues thereof, and to show item 210 containing the omnibus cross reference to other miscellaneous tariffs.

Rock Island tariff 34745 D, I. C. C. C 12643, is the next tariff treated as representative of an unusual service. The title page is reproduced to show that it applies to "pick-up" service on livestock from Rock Island stations and Rock Island southern stations in Illinois and Iowa, to Chicago, Illinois. It is shown as a time limited tariff, and only one carrier concurs therein; the Rock Island Southern Railway Company under a form FX-5 concurrence.

Page 2 is reproduced to show under "General Application" that Chicago deliveries are subject to Agent Sperry's 20-U, I. C. C. 339.

The same item provides for payment to motor truck [fol. 787] owners or operators, as well as an allowance to consignors who truck in, or deliver their own stock. There is no concurrence in this tariff of any person or motor carrier receiving these allowances.

Page 3 is reproduced to show that item 5 provides for its application on calves, goats, kids, sheep, cattle, hogs or lambs; item 10 to show that the rates are applied from farms, feed yards, pens or other loading points to the Rock Island Railroad pens or yard within a ten mile radius of the stations named; and item 40 showing that the Rock Island will pay an allowance upon presentation of required proof.

Exam. Carter: You still have considerable more of your statement, have you not, Mr. Heinemann?

The Witness: Yes.

Exam. Carter: You could not finish in another half hour, say, could you?

The Witness: I doubt it.

Exam. Carter: We will suspend at this time until 10 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock, P. M. Friday, June 11, adjourned to Saturday, June 12, 1937, at 10 o'clock, A. M.)

[fol. 788] Chicago, Illinois, June 12, 1937.

Before: Paul O. Carter, Examiner

Hearing resumed at 10 o'clock, A. M. (D. S. T.)

Appearances: As heretofore noted.

Proceedings

Exam. Carter: The hearing will come to order.

Mr. Gladson: Mr. Heinemann.

C. B. HEINEMANN, resumed the stand, having been previously duly sworn, and testified further as follows:

Mr. Gladson: If the Examiner please, at this time I would like to have marked for identification, a copy of the brief for rehearing filed with the Interstate Commerce Commission by the Stock Yards Company in the Hygrade case, Docket 84375. The only purpose for which I want to have this marked, and later offer it, is to show that the Stock Yards Company raised the question of jurisdiction of the

Commission over the Stock Yards Company in that particular case. I am short of copies of this, and I am wondering if the Commission can get along with one copy.

Exam. Carter: Yes. That will be exhibit 25.

Mr. Gladson: I offer Exhibit 25 in evidence.

Mr. Smith: No objection.

[fol. 789] Exam. Carter: Received.

(Respondent's Exhibit No. 25 received in evidence.)

Direct examination (Cont'd).

By Mr. Gladson:

Q. Mr. Heinemann, when the hearing adjourned yesterday evening you were identifying certain exhibits.

A. Yes, sir.

Q. Will you proceed with your statement.

—. Unit No. 15: The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

We preface the tariff data on this railroad with a map showing its lines and the principal livestock market served by it. The line is leased to and operated by the New York Central System, and the map shows other lines of that system. However, we have marked only the markets served by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company lines.

Cleveland, Cincinnati, Chicago & St. Louis Railway tariff 1600-G, I. C. C. 8563, is the first tariff used in this unit. At the time this memorandum was written, I had not as yet obtained my photostatic copies of that particular tariff. I shall now pass out the five copies of tariff I. C. C. 8563—or that part which I am using.

Mr. Gladson: May they be included as part of Mr. Heinemann's Exhibit No. 24, if the Examiner please?

Exam. Carter: They may be so included.

Mr. Gladson: Thank you.

[fol. 790] The Witness: The production of these photostatic copies will not change the substance of the narrative, but it is just merely to give copies for the record.

The title page shows it contains rates on live stock from stations on the Cleveland, Cincinnati, Chicago & St. Louis Railway and other lines shown to points in Central Freight Association Territory.

It is governed by Official Classification and by Exceptions thereto in Agent B. T. Jones' 130-Y, I. C. C. 2989.

Item 18, page 18, provides for the use of Agent Galligan's 20-S, I. C. C. 182, or successive issues in connection with the rates to Chicago.

By Mr. Gladson:

Q. Mr. Heinemann, have you explained what those successive issues are?

A. Yes, sir; I explained yesterday that Agent Galligan was the predecessor of Agent Sperry, and that the current issue of that tariff is 20-U, I. C. C. 339.

Q. Proceed.

A. Item 21, page 18, contains the Omnibus Clause cross reference schedule.

Cleveland, Cincinnati, Chicago & St. Louis Railway tariff 1554-L, I. C. C. 8618, is not reproduced but will be referred to in detail.

The title page shows it contains rates on livestock from stations on the Cleveland, Cincinnati, Chicago & St. Louis [fol. 791] Railway and Westfield Railroad to points in Illinois.

It is governed by Official Classification and Agent B. T. Jones' Exceptions 130-X, I. C. C. 2845.

Item 2, page 5, contains the omnibus cross reference schedule.

Item 7, page 6, and item 10, page 8, refer to Agent Galligan's 20-S, I. C. C. 182, in connection with the rates to Chicago.

I might explain here that the route of the Big Four, as indicated on this map, would be an interstate route from points on the Westfield Railroad and points on its line extending from Terre Haute to St. Louis, on shipments moving to Chicago.

Unit No. 16: Grand Trunk Railway.

We preface our tariff data on this railroad with a map of that part of the Grand Trunk Railway System lying east of Chicago. On the map we have marked the principal livestock markets in the U. S. A. served by it. It also serves the market at Toronto, Ontario, as well as other Canadian markets.

Mr. Smith: That map, it appears, falls within the category of exhibits which relate to markets other than Chicago. I make that observation so that we may have that in mind when we have a ruling on this question of admissibility. That is true, is it not, Mr. Heinemann?

The Witness: Well, the map shows the entire line of the Grand Trunk System east of Chicago.

[fol. 792] Mr. Smith: Yes.

The Witness: And the only point, so far as other markets are concerned, is in the fact that I have circled those other markets on the map.

Exam. Carter: You have done that on other maps also.

The Witness: Yes.

Exam. Carter: Which you have introduced so far.

The Witness: Yes.

Exam. Carter: I notice that.

The Witness: I am not attempting, if you please, to indicate the great many small markets, but just the more important ones in each case.

Exam. Carter: Yes.

A. (Continuing): Grant Trunk Railway tariff 320-N, I. C. C. A-2758, is used as representative. The title page is reproduced to show that it contains rates on livestock from Grand Trunk Railway stations to points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, and West Virginia.

Page 8 is reproduced to show in Rule 25 that traffic to and from Chicago, Illinois, will apply as provided in Agent Sperry's 20-U, I. C. C. No. 339.

Page 11 is reproduced to show the manner of publishing rates, and that the rates from or to Chicago carry cross reference to Rule 25, to which I have referred.

[fol. 793] And I might add, in connection with this Grand Trunk data, that the Grand Trunk Railway does operate some chutes and pens at 55th Street, on its tracks in what is known as the Elston section of Chicago. Some livestock is received and delivered through those facilities.

Unit No. 17: Illinois Central Railroad.

We preface our tariff data on this railroad with a map showing its lines which serve many livestock markets as marked by circles thereon. It is to be noted that this company, unlike any other line in the U. S. A. serves live stock markets in the Western Territory, Central Territory and Southern Territory.

Illinois Central Railroad tariff 17401-B, I. C. C. A-10848, is used as one representative tariff. The title page is reproduced to show that it contains rates on livestock between

the cities named, including the market cities of Chicago, East St. Louis, Milwaukee, Peoria, St. Louis, St. Paul, Sioux Falls, Springfield, Illinois, and the Missouri River market cities and stations in Illinois, Iowa, Minnesota, South Dakota, Wisconsin, as well as Omaha and St. Louis. The title page shows the tariff is governed by Western Classification and by the rules and regulations contained in Agent L. E. Kipp's 236-D, I. C. C. A-2435.

Page 6 is reproduced to show the general application of the rates, and page 9 is reproduced to show the method of [fol. 794] publishing the rates. It will be noted that Union Stock Yards, Illinois, is index No. 2, and that the rates to be used are those authorized in Agent Sperry's 20-T, I. C. C. 242.

Illinois Central Railroad tariff 10303-J, I. C. C. A-10917, is also used as a representative tariff. The title page is reproduced to show that it contains rates on livestock between Chicago, East St. Louis, Peoria, and other points and stations in Illinois, Indiana and Wisconsin.

Page 9 is reproduced to show that Union Stock Yards, Illinois, is indexed as a station on the Illinois Central as described on page 10. Page 10 is reproduced to show that Union Stock Yards, Illinois, on the Illinois Central, will take rates prescribed in circled (5) reference. Circled (5) reference is shown on reproduced page 18, and it states that rates will apply as authorized by Agent Sperry's tariff 20-T, I. C. C. No. 242.

Page 12 is reproduced to show the general rules governing the application of the rates.

Pages 20 and 35 are reproduced to show their method of stating rates and the cross references thereon.

I should like to add in this list of Illinois Central tariffs, Illinois Central Railroad Company tariff I. C. C. A-11040, covering pick-up service of livestock at stations on the Illinois Central Railroad in Illinois, Indiana, Iowa and Wisconsin, forwarded in carloads by the Illinois Central Railroad to Chicago, East St. Louis, Indianapolis, Madison, [fol. 795] Wisconsin, Peoria and Springfield, Illinois. The title page, which is reproduced, shows that it is governed by the classifications indicated, and by Agent R. A. Sperry's I. C. C. No. 317, supplements thereto or successive issues thereof.

Mr. Gladson: If the Examiner please, may it become a part also of Exhibit No. 24 for identification as a part of unit 17?

Exam. Carter: It may.

The Witness: I have reproduced page No. 2, to show the rules and regulations governing the tariff, and refer specifically to item 5, which defines the term "pickup"; also item 40, which covers the rule for allowance for pickup service.

Reproduced page 3, shows the index of stations of the railroad, locations at which the pickup service will be handled on shipments to Chicago.

I pass page 4 without observation, as do I also page 5; also pages 6 and 7, because of their applicability to other markets.

By Mr. Gladson:

Q. You are passing pages 4, 5, 6 and 7?

A. That is right. I have, if the Examiner please, in connection with that tariff, made an investigation to ascertain the terms under which the pickup service is conducted on shipments to Chicago, and I have, if you please, a copy of the form of contract which is used between the Illinois Central Railroad and its contracting motor carriers, or operators, who perform this pickup service for it. If it is so desired, I can——

[fol. 796] Mr. Gladson: Will you produce it, please.

The Witness: I have only the one copy at the present. But I can furnish any number of copies from it.

Mr. Smith: I object to it as immaterial, if it is your purpose to offer it.

Mr. Gladson: Well, if the witness has only one copy——

Exam. Carter: This is a contract between the Illinois Central Railroad and the motor carrier operators that perform its pickup service; is that it?

The Witness: Yes, at the stations indicated in this tariff on shipments coming to Chicago.

Exam. Carter: What is the materiality of that?

Mr. Gladson: Well, Mr. Examiner, the next question that I was going to put to him was whether or not these motor carriers file tariffs with the Interstate Commerce Commission.

Exam. Carter: The general purpose is to show what the arrangements are for the transportation of livestock to the Union Stock Yards at Chicago; is that it?

Mr. Gladson: That is one of the purposes of it, yes, Mr. Examiner.

Exam. Carter: Well, what is another purpose?

Mr. Gladson: Another purpose is, as no doubt you may have anticipated, Mr. Examiner, that we expect to show what the situation is at other markets.

Exam. Carter: Well, but I mean, the immediate purpose.

[fol. 797] Mr. Gladson: The immediate purpose of this particular exhibit, if the Examiner please, and of the questions that I expect to put to the witness in connection therewith, is to show that these motor carriers perform part of the transportation service, and do not file schedules with the Commission.

Exam. Carter: I will allow it to go in. However, you cannot file it and withdraw it from the record, so I would defer the filing of it until you have copies.

Mr. Gladson: That is what is disturbing me. Do you have a copy, Mr. Heinemann, from which you can make additional copies?

The Witness: Yes, sir; I can supply them all by Monday.

Mr. Gladson: Then I will ask that the document——

Exam. Carter: Just a moment. Do you mean that you have a copy additional to that?

The Witness: Oh, yes.

Exam. Carter: From which you can make other copies?

The Witness: Yes.

Exam. Carter: Then you may file that, and furnish other copies Monday.

Mr. Gladson: I offer it in evidence, and ask that it be marked Respondent's Exhibit No. 26; and we will file additional copies Monday, and supply Mr. Smith with a copy at that time.

(Respondent's Exhibit 26, Witness Heinemann, received in evidence.)

[fol. 798] The Witness: Mr. Examiner, I should like to observe that in condition No. 8, shown on page 3 of this contract,—or in paragraph No. 8, is the condition restricting the contractor from hauling livestock in competition with the Illinois Central Railroad.

Mr. Smith: I want the Examiner to fully appreciate just what this exhibit is. It is offered for the purpose of showing that some motor carriers at some place other than Chicago, perform some service in connection with the handling of livestock, as it is alleged, without filing any tariffs with the Interstate Commerce Commission.

Of course, the best evidence of that, as to what has been done, or what is about to be done, or what may be done under the terms of the Motor Vehicle Act, would be shown by the files of the Commission. I do not know what the fact may be about it; I am not in a position to inquire into it at this time; but the purpose is to show what I have indicated, what some motor carriers do at some place other than Chicago; and therefore I say to the Examiner that it is wholly immaterial to this issue and to this inquiry.

Mr. Gladson: We have offered the document——

Exam. Carter: Let me see if I am correct in my understanding of this, Mr. Gladson. My understanding of Respondent's Exhibits Nos. 24, 25 and 26, up to this point, is that they are offered to show the tariff arrangements, [fol. 799] and the rates in effect on livestock from various points to Chicago; and the manner in which the railroads treat the Union Stock Yard Company in their tariffs on such traffic.

Now, under my ruling of yesterday, I asked you to separate the testimony relating to the transportation to Chicago, from the other testimony that Mr. Heinemann was to give at this time; and that is my understanding of the purpose of these exhibits.

Now, is that correct?

Mr. Gladson: Well, if the Examiner please, Exhibit 25——

Exam. Carter: Of course, that does not have anything to do with it.

Mr. Gladson: That does not have anything to do with it.

Exam. Carter: That is true, but how about exhibits 24 and 26?

Mr. Gladson: Well now, we have not offered exhibit 24, containing all of these documents, as yet. We expect to use them——

Exam. Carter: Well, under my ruling of yesterday, I permitted them to be identified for the purpose which I have described.

Now as to what use may be made of the contents of these exhibits, other than that which I have described, I will have to rule upon later; but I want that made clear, at this point in the record, that that is my understanding of the purpose, [fol. 800] up to this point. You may have a further purpose later on in identifying these exhibits, 24 and 26——.

Mr. Fulbright: If the Examiner please, in deference to the ruling of the Examiner, the witness has eliminated from his descriptive statement, those parts of the statement which refer to the situation at other markets.

Exam. Carter: Yes, that is correct. I thought we understood the situation up to this point. That is not precluding you from offering anything later on——

Mr. Fulbright: We understand.

Exam. Carter: ——that you may desire to offer.

Mr. Fulbright: We understand.

Mr. Quasey: If the Examiner please, might it not also be appropriate to observe here that it is equally as important to have that limitation go to conditions, dealing with situations at other points as well, other than public markets.

Now as far as the contract is concerned, here, that the witness has been referring to, that deals, as I understand it, with pickup service.

Exam. Carter: At point of origin.

Mr. Quasey: At point of origin, yes, sir, a situation which is surrounded by materially different circumstances and conditions; because if a carrier does not like the service, for some reason or another, it can eliminate the arrangement with that individual, and engage another. But in the case of [fol. 801] the Union Stock Yard & Transit Company, there is only one facility at Chicago.

Exam. Carter: As I say, the only purpose that I can see, in introducing this contract at this particular time, up to this point, based upon the rulings which I have made up to this point, and Mr. Heinemann's descriptions of these tariffs,—I say, the only purpose for which you are offering it, that I can see now, is to show at this time the through transportation, from point of origin to final destination at Chicago; and how that transportation is performed, according to the tariffs.

Is that not it?

Mr. Gladson: Well, we want to show——

Exam. Carter: If you have any purpose beyond that, I would like to know what it is. Otherwise I cannot intelligently rule.

Mr. Gladson: Of course I have not offered this other exhibit yet, if the Examiner please. We have merely had it marked for identification; and Mr. Heinemann is now telling us what it is all about. I will ask him another question.

By Mr. Gladson:

Q. Mr. Heinemann, do you know whether or not the truck men who perform this service of picking up the stock for the Illinois Central Railroad, file tariffs with the Interstate Commerce Commission?

Mr. Smith: Just a moment. That is objected to as immaterial.

Mr. Quasey: I join in the objection.

[fol. 802] Exam. Carter: The objection is sustained.

Mr. Gladson: Note an exception, please. I offer to prove by this witness, if the Examiner please, that these men who perform the pickup service for the Illinois Central Railroad, under the contract, and as provided in their tariff, do not file tariffs with the Interstate Commerce Commission.

Mr. Smith: The same objection.

Exam. Carter: The offer is denied.

Mr. Gladson: Exception.

The Witness: Mr. Examiner, I had not completed my observations about this tariff. My thought in introducing it was to show to the Commission all of the tariff elements entering into the transportation covered by this and the other tariffs included herein; and as I have shown in the reproduced pages, paragraph C, on page 3, which contains the application of the tariff on shipments to Chicago, provides for allowances to shippers who themselves perform the service.

I want to make the further observation that Mr. Quasey is entirely wrong as to the application of this tariff. It does apply not only to the Union Stock Yards at Chicago, but the Illinois Central Railroad has brought in quite a number of shipments under this tariff which were delivered down on its track at 24th and Lime Streets; and when he says that it is restricted exclusively to Chicago, he of course, misstates himself.

[fol. 803] Mr. Smith: I do not understand him to say anything of the sort, Mr. Heinemann.

The Witness: Well, the implication was there—at least I got it, as a tariff man, that way.

By Mr. Gladson:

Q. Proceed.

A. Unit No. 18: the Michigan Central Railroad.

We preface the tariff data on this railroad with a map of the lines of that company. The property is leased to the New York Central System, and the map covers other lines of the system. We have, however, marked only the markets served by the Michigan Central Railroad lines.

Michigan Central Railroad tariff I. C. C. 6030, is used as a representative tariff in this unit. The title page is reproduced showing it contains rates on livestock from Michigan Central Railroad stations and other points to Central Freight Association points, also mileage rates as provided.

It is governed by Official Classifications and by Agent B. T. Jones' No. 130-Y, I. C. C. 2989, and 515-B, I. C. C. 2923.

Page 11 is reproduced to show item 45, which makes rates to or from Chicago subject to Agent Sperry's 20-U, I. C. C. 339.

Page 14 is reproduced to show item 135, which is the omnibus cross reference schedule.

Perhaps it might be appropriate to explain that, as a general proposition, the lines operating in Central Freight Association territory have their individual lines issues which [fol. 804] cover the rates to points in Central Freight Association territory from Chicago, and from those points to Chicago; but that on shipments moving via those lines to and from Eastern Trunk Line territory, New England territory, and Virginia cities, those rates generally are included in one of Agent B. T. Jones' tariffs, which I shall later read.

Unit No. 19: Minneapolis, St. Paul & Sault Sainte Marie Railway Company.

We preface the tariff data on this railroad with a map of the lines of this company. On the map we have marked the public livestock markets served by the company in the U. S. A. It also serves the Canadian market at Winnipeg.

Minneapolis, St. Paul & Sault Sainte Marie Railway Com-

pany tariff 344-B, I. C. C. 6582, is treated as representative. The title page is reproduced to show that the tariff contains rates on livestock between stations in the states of Illinois, Iowa, Minnesota, Montana, North Dakota, South Dakota, and Wisconsin. It is governed by Western Classification and by the rules in Agent Kipp's 236-D, I. C. C. A-2435, or successive issues.

Page 6 is reproduced to show that under "Application of Rates," the rates to or from Chicago will apply as shown in Agent Sperry's tariff 20-T, I. C. C. 242.

Minneapolis, St. Paul & Sault Sainte Marie Railway Company tariff 343-A, I. C. C. 6584, is also treated as representative. The title page is reproduced to show that the tariff [fol. 805] contains rates on livestock between Chicago, Duluth, Milwaukee, Minneapolis, Minnesota Transfer, St. Paul, and points taking the same rates, and stations in Illinois, Indiana, Minnesota, and Wisconsin. It is governed by Western Classification and by the rules in Agent L. E. Kipp's I. C. C. A-2435, or successive issues.

Page 6 is reproduced to show the cross reference to Agent Sperry's No. 20-T, I. C. C. 242, under "Application of Rates to Chicago, Illinois."

I might explain at this point that this particular line, in handling a great many shipments of Canadian cattle, and some of range sheep, into the Chicago territory, prior to the effective date of the rule in Agent Sperry's tariff eliminating the $2.70 terminal charge, made quite a number of deliveries of shipments through the facilities of the Clearing stock yards, located in the vicinity of 65th Street and Cicero Avenue, at the flat Chicago rates.

Unit No. 20—The New York Central Railroad Company——

By Exam. Carter:

Q. Just a moment please, Mr. Heinemann. These points in Chicago, which you have described, on the lines of individual railroads, where you say deliveries have been made of livestock: they are not livestock markets, are they?

A. No, sir.

Q. And dealers are not located at those particular points, are they?

A. No, sir, although at Clearing there has been consider- [fol. 806] able trading in sheep stopped there under their

feeding and fattening in transit rules; but they are not what I would term engaged in the business there. In other words, they are itinerent dealers, who go out for a particular shipment or trainload.

Q. Now, as to the volume of livestock that has been handled at these points on these individual lines: is that a substantial portion of the livestock received at Chicago?

A. At the Omaha Packing Company, yes, sir; but at the other points, no, sir.

Exam. Carter: Proceed.

By Mr. Smith:

Q. Mr. Heinemann, is there any other public stock yard in Chicago, other than the Union Stock Yard & Transit Company's yard?

A. Not as defined in the Packers & Stockyards Act, no, sir.

By Mr. Fulbright:

Q. Well, Mr. Heinemann, do the carriers absorb the unloading charges at those various plants, or do they pay for the unloading, as they do at the Union Stock Yard Company?

A. When delivery is effected through the Clearing yards, that unloading is taken care of by the carrier. That is under a contractual arrangement with the Belt Railway, and the operator of the yard.

Exam. Carter: Proceed.

A. Unit No. 20: The New York Central Railroad Company.

[fol. 807] We preface our tariff data on this railroad with a map of its lines. The map covers the owned lines of the New York Central as well as the important leased lines. On it we have marked the principal livestock markets served by it.

New York Central Railroad tariff 1021-B, I. C. C. LS-1605, is treated as the representative tariff in this unit. The title page is reproduced, showing it contains rates on livestock from New York Central stations and stations on connecting lines to Central Freight Association points shown.

I. C. C. LS-1605 is governed by Official Classification and by Agent B. T. Jones' Exceptions 130-T, I. C. C. 2248, or successive issues.

Page 370 is reproduced to show item 370, which is the omnibus cross reference schedule.

Unit No. 21: The New York, Chicago & St. Louis Railroad Company.

We preface our tariff data on this railroad with a map of its railroad lines. On it we have marked the principal livestock markets served by it.

The New York, Chicago & St. Louis Railroad tariff 619-H, is the first tariff treated as representative. The title page is reproduced and shows it contains rates on livestock from New York, Chicago & St. Louis stations to points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin. It is [fol. 808] governed by the numerous tariffs shown on its face.

Page 2 is reproduced to show that item 30 provides that rates to Chicago are to be applied as shown in Agent Galligan's I. C. C. 182. This is now Agent Sperry's 20-U, I. C. C. 339.

Supplement No. 2, title page and page 19 thereof, are reproduced to show Note 35, which provides for the use of Agent Galligan's I. C. C. No. 182, on rates from Chicago.

By Mr. Smith:

Q. Rates from Chicago?

A. Yes, sir, as differentiated from the previous one, to Chicago.

Unit No. 22: The Pennsylvania Railroad Company.

We preface the tariff data on this railroad with a map of its lines. On this map we have marked with a circle the important stock yards served by it.

Pennsylvania Railroad tariff 3939-A, I. C. C. 396, is also used as representative. The title page is reproduced to show it contains livestock rates from Pennsylvania Railroad and other stations on other lines shown, to stations in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia and Wisconsin. It is governed by Official Classification and the Exceptions in Agent B. T. Jones' I. C. C. 2248.

Page 17 is reproduced to show item 175, the omnibus cross reference schedule.

Pennsylvania Railroad tariff 999-A, I. C. C. 1306, is another representative tariff. Its title page is reproduced [fol. 809] and shows it contains rules, regulations and

charges governing the handling and transportation of livestock.

Page 10 is reproduced to show item 30, covering the loading of livestock at public yards.

Page 11 is reproduced to show item 35, covering the unloading of livestock at public yards.

Page 12 is reproduced to show item 105, covering the collection of charges on ordinary livestock stopped for feed, water and rest at other than railroad operated stockyards.

Page 13 is reproduced to show item 115, defining "suitable Pens", and item 120, defining "public stock yards", which does not conform to the definition of the Commission in I. & S. 4120; item 125, showing the names of public stock yards on the Pennsylvania Railroad; and item 135, providing for the non-absorption of yardage on transit livestock.

Pennsylvania Railroad tariff 1426-B, I. C. C. 1450, is not reproduced, but will be identified by detailed description. This tariff is essential for a proper description of the rates applicable to shippers of livestock moving from Chicago to points in the New York harbor district, the Greater New York District; and I refer by reference to deliveries effected on such shipments, and refer specifically to those moving from Chicago, although they would of course apply on others as well.

Its title page shows it contains rules governing deliveries at Brooklyn, Jersey City, New Jersey, Long Island City, [fol. 810] and New York, and the Lighterage and Terminal Regulations in New York Harbor.

Rule 85, items 1150, 1155, and 1160, page 45, cover deliveries of livestock at Jersey City stock yards for New York Market. I might interpolate there that deliveries of livestock moving into that district by the Pennsylvania railroad, under their contractual arrangement with the Jersey City stock yards, are delivered through the facilities of that yard, and by means of their lighters.

Item 1155 provides for delivery by the Jersey City Stock Yards Company to any point within the free lighterage limits of the harbor.

Item 1160 provides that on carloads sold at Jersey City yards market two free deliveries will be made at points within the free lighterage limits, subject to an additional charge of $2.70 per car for diversion or reconsignment.

Item 1162 of supplement 33 makes provision for stopping livestock at the Jersey City yards when destined to points beyond. I might explain there that that frequently has to be done, so that the consignees may arrange for the necessary feed to be supplied, before they move on to other abattoir destinations in the Greater New York District.

Rule 1131, item 1935, contains a provision for the allowance of ferriage in lieu of lighterage on livestock arriving by rail at Jersey City, Harrison, Newark, or Waverly, New [fol. 811] Jersey, there slaughtered and the product drayed to New York or Brooklyn within six months. The carrier also absorbs the cost of ferriage on the empty truck, if returned empty.

I call attention to the fact, as shown, that no stockyards company or motor carrier is a party to this tariff.

Unit No. 23: Pere Marquette Railway Company.

We preface the tariff data on this railroad with a map of its lines. On the map are shown the livestock markets served by it. These are circled.

Pere Marquette Railway tariff 6386-C, I. C. C. 5043, is used as a representative tariff of this company. The title page is reproduced to show that it names rates on livestock between Buffalo, Chicago, Cleveland, Detroit, and points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin. It is governed by Official Classification and by Agent B. T. Jones' tariffs No. 130-N, I. C. C. 2845, and No. 515-B, I. C. C. 2923.

Page 11 is reproduced to show rule 20, which makes rates to and from Chicago apply as provided in Agent Sperry's 20-U, I. C. C. 339.

Page 12 is reproduced to show rule 76, containing the omnibus cross reference schedule.

Unit No. 24: Wabash Railway.

We preface the tariff data on this railroad with a map of the lines of this railroad, showing the territory served by [fol. 812] it. The important livestock markets served by it are marked with a circle. This line traverses territory in the Western Territory and in the Eastern Territory.

Wabash Tariff A-18490, I. C. C. 6841, is treated as a representative tariff. The title page is reproduced, and this shows that it contains rates on livestock between Wabash stations in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin. It is governed by

Western Classification and by rules published in Agent L. E. Kipp's I. C. C. A-2435.

Page 11 is reproduced to show item 10 and the method of grouping various cities to and from which rates apply. Also item 30 makes the rates to and from Chicago apply as per Agent Sperry's tariff 20-T, I. C. C. No. 242, or successive issues.

Page 15 is reproduced to show item 190, covering the omnibus cross reference schedule.

Wabash tariff K-14141, I. C. C. 6882, is treated as a representative tariff. The title page is reproduced to show that it contains rates on livestock to, from and via the Wabash on and east of the Mississippi River to and from various cities and live stock markets. It is governed by Official Classification and by Agent B. T. Jones' 130-W, I. C. C. 2714, or successive issues.

Page 6 is reproduced to show item 10, which makes rates to and from Chicago apply as provided in Agent Sperry's 20-T, I. C. C. 242, or successive issues.

Page 7 is reproduced to show item 65, which is the omni-
[fol. 813] bus cross reference schedule.

I wish to add in connection with this carrier that it has made deliveries of carload shipments of livestock consigned to Chicago, at a point on its line at 43rd and Parnell Streets, a point just east of the Union Stock Yards a few blocks.

Unit No. 25: Western Trunk Lines.

Agent L. E. Kipp's 240-E, I. C. C. A-2753, is one of the principal Western Trunk Line tariffs containing livestock rates. The title page is reproduced showing it contains livestock distance rates between stations in the states of Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Wisconsin and Wyoming. It is governed by Western Classification and by the rules in Agent L. E. Kipp's 236-G, I. C. C. A-2687, or successive issues.

Page 5 is reproduced to show item 10, which limits the application to movements on which specific rates have not been published, and which would apply to Chicago in instances where a specific rate had not been published either to or from Chicago.

Agent L. E. Kipp's 236-H, I. C. C. A-2797, is used as a tariff to which cross reference is quite generally made by railroad livestock tariffs in Western Trunk Line territory.

The title page is reproduced to show it contains rules and conditions governing the transportation of livestock.

[fol 814] Page 24 is reproduced to show item 600, which covers the definition of the terms "public stock yards" and "public live stock markets"; section 2 also lists the points at which such "stock yards" are located.

Right in that connection, and while on that tariff, Mr. Examiner, I referred yesterday to the fact that the Western Weighing & Inspection Bureau had certain jurisdictional duties on traffic to or from the Stock Yards. This particular tariff to which I have just referred, provides that the Western Weighing & Inspection Bureau is governed by the rules which provide that all weight, whether actual or estimated; all descriptions of animals; all application of rates, rules and/or regulations on livestock shipped to the Union Stock Yards, Chicago, are subject to the supervision of the Western Weighing & Inspection Bureau.

Now this rule applies to shipments routed over one or more railroads; and the authority for this statement is taken from this tariff, so far as these lines are concerned: Alton; Santa Fe; Great Western; St. Paul; North Western; Rock Island; Illinois Central, and Soo Line. The Burlington Railroad has its own tariff, I. C. C. 18815, which makes similar provision for that company.

By Mr. Fulbright:

Q. Before leaving this, Mr. Heinemann; the exhibit does not show the lines of railroad that are parties to this agency tariff.

[fol. 815] A. That page was not reproduced, Mr. Fulbright. The tariff states that.

Q. You mean, as to what those lines are?

A. It would be easier to state what ones are not parties. All of the line haul carriers entering Chicago from the west, are parties to that tariff.

Q. And that is true, of course, as to both agency tariffs.

A. That is true.

Q. Are they the only agency tariffs that deal with this subject?

A. Oh, no, sir.

Q. These are submitted as representative?

A. Yes, sir.

Q. And they are representative?

A. Yes, sir.

Q. I notice that in several places you have testified, in describing your exhibits, that a certain tariff is treated as representative.

In making that statement, do you mean to testify that it is in your opinion representative?

A. I mean that I have treated it as representative, because in my opinion it is representative of the particular method. I might enlarge upon that, Mr. Examiner, by stating a fact which I think most tariff men will agree to, namely, that the chief of tariff bureau of a railroad—or, the chiefs of tariff bureaus of all railroads, all have their own ideas [fol. 816] as to the best form of tariffs to be issued for their respective companies. They do not all follow the same system, although they may arrive at the same ultimate destination. I have tried to select representative tariffs for each of the lines, and I have tried to select representative tariffs from the committee issues designed to show a truly representative picture of their method of naming these rates, and connecting them with the various tariffs which may govern them.

Mr. Fulbright: Thank you.

The Witness: Unit No. 26: Central Freight Association.

Agent B. T. Jones' tariff 218-J, I. C. C. 2874, is treated as a representative committee issue. It contains rates on classes and commodities, but we refer to its commodity rates on livestock. The title page is reproduced, showing it contains rates from points in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, West Virginia, and Wisconsin to eastern basing points. This is a tariff covering a large portion of the livestock moving from such markets as Chicago to eastern markets and slaughterers. It is also used in constructing rates from points west of Chicago.

It is governed by Official Classification and Exceptions thereto.

Pages 569, 570, 571, 572 and 573 of the original tariff and the title page and pages 102, 103 and 104 of supplement No. 47, are reproduced to show the method of publishing the spe- [fol. 817] cific rates.

I might amplify that description, without presenting much additional material, by stating that in this tariff will be found indexed Chicago and other points in the states named, and a number following the indexing at Chicago on each of its respective lines. Reference to that number

brings you to the geographical location of those stations; and in that particular section of the tariff will be found the rate base applicable on shipments of livestock from Chicago via that particular line, to points in so-called Eastern Trunk Line territory, New England territory, the Virginia Cities, and certain cities in Canada.

That tariff, by appropriate cross-reference, contains reference to the governing issues, which show the delivery conditions on all of these shipments destined to these eastern points; and I find myself very greatly handicapped by not being permitted to tell you what those delivery conditions are on traffic to and from Chicago.

Mr. Gladson: Make a note of it, Mr. Heinemann, so that you will not overlook it in a later part of our proceeding.

The Witness: All right.

Agent B. T. Jones' tariff 400-N, I. C. C. 2964, is treated as a representative committee issue.

I should like to make this observation about B. T. Jones' 227-K, I. C. C. 2803, to this effect, that we do ship a consider- [fol. 818] able volume of livestock from Chicago to Indianapolis, which is delivered under the rule described in that tariff, that I have referred to.

By Mr. Fulbright:

Q. Are all of the Central Freight Association lines parties to these agency tariffs?

A. Yes, sir—that is, the class-1 carriers.

Q. Yes.

A. The line haul carriers.

Q. Yes.

A. Yes, sir, they are.

Exam. Carter: We will take a short recess at this time.

(Whereupon a short recess was taken.)

Exam. Carter: Come to order. You may proceed.

The Witness: Mr. Examiner, counsel here have called my attention to the fact that in some cases I have omitted to refer to the successive reissues of these various tariffs to which I have referred.

I might explain that there are two methods generally followed by a tariff publishing agent, namely, to either include that in the title page governing the description; or it is covered by an appropriate schedule in the tariff to the effect

that where it refers to the same tariff, it shall be taken to mean that it also applies to supplements thereto and successive reissues thereof.

So, if you please, I should like to have that considered [fol. 819] in connection with any description which I may have used, where I overlooked that.

By Mr. Hamilton:

Q. Mr. Heinemann, all of Galligan's 20-series tariffs are now Sperry's tariff 20-U, are they not?

A. By succession, yes, sir.

Q. And all of the Sperry 20-series, for example, Sperry's 20-T, are now Sperry's 20-U?

A. Yes, sir.

By Mr. Gladson:

Q. Go ahead, Mr. Heinemann.

A. Agent B. T. Jones' tariff 515-B, I. C. C. 2923, contains miscellaneous rules and regulations. At the time I wrote up the memorandum, Mr. Examiner, I did not have any photostatic copies of the pages used. I now have the requisite number of copies of this particular tariff, which I wish to pass out at this time.

Mr. Gladson: If the Examiner please, may this tariff, which has just been handed out by the witness, be made a part of unio 26, of respondant's exhibit No. 24.

Exam. Carter: It may.

Mr. Gladson: Go ahead, Mr. Heinemann.

A. Items 10, 15, 20, 25, 30, 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, 90, 95, 100, 105, 110, 115, 120, 125, 130, and 135, contain rules and charges for unloading carload freight through freight houses and facilities of the carriers. Item 40 covers unloading at Chicago. This provides a charge of 2½ cents [fol. 820] per 100 pounds when the carrier unloads carload package freight into freight houses or upon platforms.

Item 255, pages 64, 65, 66, 67 and 68, covers the rules on loading, unloading, feeding and watering livestock.

Items 260 to 305 cover the allowances for or absorptions of loading and unloading at the markets shown.

Unit No. 27: Southwestern Lines.

J. R. Peel's tariff 188-B, I. C. C. 2590, is the first tariff in this unit. The title page is reproduced, showing it contains livestock rates between stations in Arkansas, Louisi-

ana, Missouri, New Mexico, Oklahoma, and Texas, and livestock market points and other stations.

Page 199 is reproduced to show item 20, which defines the rates bases shown in various columns, including column 5-C, which makes Chicago rates subject to Agent Galligan's tariff 20-T, I. C. C. 242.

Page 213 is reproduced to show item 310, which is the rule on loading and unloading live stock shipments. It also defines suitable pens, and refers to sections 2 and 3 of item 190 for the location of public stock yards and public markets.

The title page and page 19 of supplement No. 61 are reproduced so as to show item 190-G, which is the current item 190 referred to in item 310.

This particular tariff would cover rates to Chicago from practically all stations in those states, including the posted [fol. 821] public markets located in those states; and again I find myself unable to give you the description necessary to complete the description of the movement from those points to Chicago.

J. R. Peel's tariff 189-E, I. C. C. 2897, is the fifth tariff in this unit. The title page is reproduced to show it contains rates from Oklahoma, Texas, and New Mexico, to various points including the livestock market of Chicago.

Pages 12 and 13 are reproduced to show the definition and list of public stock yards and public livestock markets.

Page 18 is reproduced to show item 310, which covers the rules on loading and unloading livestock.

I might say in connection with Agent Peel's tariffs, that as a general proposition in the Western Trunk Line and Southwestern issues, and quite generally in the Committee Issues of the west, they have arrived at what is a fairly uniform description of the rules governing the loading and unloading of livestock at the public markets, or those which are recognized as public markets, including, of course, Chicago.

To that extent their tariffs are in better shape, and more easily reconciled, than is the case of some of the individual lines' issues, which have failed to engage in any system of uniformity.

By Mr. Fulbright:

Q. What Southwestern lines are parties to this committee issue—lines which serve Chicago?

A. The Chicago, Rock Island & Pacific, Atchison, Topeka [fol. 822] & Santa Fe, and the Chicago, Burlington & Quincy subsidiary lines in Texas. I believe that would be all, Mr. Fulbright.

Q. Does not the Santa Fe——

A. I mentioned the Santa Fe.

Q. Did you?

A. Yes, sir.

Q. In other words, they serve Chicago direct.

A. Yes, sir.

Q. Now, are all class-1 carriers in the southwest, parties to this committee issue?

A. Yes, sir.

Q. And they would serve Chicago, of course, on interline rates, in connection with traffic originating on those Southwestern lines?

A. Yes, sir,—whether it was originated on their own lines, or some other lines in Texas, or those states.

Q. And these tariffs would govern?

A. Yes, sir.

By Mr. Gladson:

Q. Proceed.

A. Unit No. 28: Trans-Continental Freight Bureau.

L. E. Kipp's tariff 52-D, I. C. C. 1389, is treated as a representative tariff in this group. Its title page is reproduced, showing it contains rates between points in Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, [fol. 823] North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming,—that description would of course include Chicago as a point; and Arizona, British Columbia, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington.

Page 62 is reproduced to show item 175, which is the rule governing loading or unloading of livestock.

The title page and page 7 of supplement No. 4 are reproduced to show item 120a, which is the definition and list of public stock yards and public livestock markets.

Unit No. 29: Pacific Freight Tariff Bureau,—and I might add, this would only be used as a factor in the construction of through rates on shipments to or from Chicago, where through rates were not published,—or rather, I mean to say, combination rates; I should have said, used as a factor

in the construction of combination rates on shipments to or from Chicago where through rates were not published.

Agent F. W. Gomph's tariff 220-B, I. C. C. 1209, is used as a representative tariff in this unit. The title page is reproduced and shows it contains rates on livestock between points in Idaho, Montana, Nevada, Oregon, Wyoming, New Mexico, Arizona, and Texas, and points in Utah, Texas, and California, as described therein.

Page 23 is reproduced to show item 235, which sets out the loading and unloading rules on live stock and refers to item 270 for a list of public stock yards.

[fol. 824] The title page and page 7 of supplement 5 are reproduced to show item 270a, which defines public stock yards and public livestock market points.

Unit No. 30: Southeastern Tariffs of Agent Roy Pope.

With a few exceptions, there are not through livestock rates between Chicago and points in Southeastern territory and Carolina territory, although there are through rates between Chicago and points in the Mississippi Valley generally covered by either committee issues or individual lines' issues. However, there is a movement of livestock to Chicago from some of the states, including the states of Alabama and Georgia, and certain points in eastern Tennessee; and occasionally, but rarely, some of the Carolinas. Obviously these tariffs which I am about to cover, would in part be used as a factor in the construction of combination rates, in the absence of through rates to and from Chicago.

Agent Roy Pope's tariffs cover the major part of the livestock traffic to, from and between the Southeastern territory. His various tariffs refer by cross-reference to the rules governing livestock published in his tariff 100-Q, I. C. C. No. 7. It will be treated as tariff No. 1 in this group.

Agent Pope's tariff 100-Q, I. C. C. No. 7, contains rules governing livestock and applies, as stated on its cover page, only in connection with tariffs making specific reference thereto.

Item 61a of supplement No. 3, covers the rules on loading, [fol. 825] unloading, feeding, and watering livestock. Paragraph (a) provides for the unloading or loading of livestock at public markets. Paragraph (h) lists the cities where public stock yards are located.

Of the 59 cities listed as being "cities where public stock yards are situated", Chicago is the only point where the

Stock Yard Company files a tariff with the Interstate Commerce Commission——

Mr. Smith: I move to strike the statement out as immaterial.

Exam. Carter: Motion granted.

Mr. Gladson: Exception.

The Witness (Continuing): Agent Roy Pope's Mississippi Valley Live Stock Tariff 147-A, I. C. C. 1395, contains rates from Mississippi Valley to Baton Rouge, Birmingham, Brookport, Cairo, Cincinnati, Evansville, Gulfport, Henderson, Hickman, Louisville, Memphis, Metropolis, Mobile, Nashville, Natchez, New Orleans, Owensboro, Paducah, St. Louis, Vicksburg, and other points. It is governed by Southern Classification.

Item 800, page 44, makes the tariff subject to Agent Speiden's tariff 100-N, I. C. C. 1290, or successive issues.

Item 836, page 47, is the omnibus cross-reference schedule.

Agent Speiden's Southeastern Live Stock Tariff 148-B, I. C. C. 1335, now under Agent Roy Pope, is a tariff which contained 626 pages in the original issue. At the present [fol. 826] time, June 1, 1937, the tariff has supplements 19, 24, 85, 103, 112, 113 and 116, which contain all changes although supplement 116 does not become effective until June 26, 1937.

Item 750, page 87, makes the tariff subject to Agent Speiden's 100-N, I. C. C. 1290, or successive issues.

This tariff contains many thousands of rates between points in the south and points in the south, or on or near its borders. It is by far the largest livestock tariff in that section.

That tariff was published as the result of the investigation of the Commission into the Southeastern livestock rate situation, as the result of which the shippers and the carriers reached a compromise, which resulted in the publication of rates upon a compromise scale, which afterwards was given the approval of the Commission.

As I have stated there, that covers more rates than any other tariff, or than all other tariffs in the Southeast, so far as rates on ordinary livestock are concerned.

That, Mr. Gladson, I believe concludes the narrative description of these tariffs.

Mr. Gladson: May we go off the record for a moment, if the Examiner please?

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Now back on the record.

Mr. Gladson: Now at this time, if the Examiner please, I [fol. 827] offer all of the tariff provisions shown in Respondent's Exhibit No. 24 for identification, and the other tariffs referred to by the witness, insofar as those pertain in any way to livestock shipments to and from Chicago, or the Chicago switching district.

Mr. Smith: Well now, that is rather an interesting form in which Mr. Gladson makes that offer. He says "insofar as they pertain". Well, of course it has become entirely evident that the Yards Company is contending that everything in these tariffs pertains to this situation at Chicago, using the rationalization that they rely on, that deals with the question that is in issue here.

Now, I want to know whether Mr. Gladson is using that term with that in mind, or whether he simply is offering here those portions of these tariffs which cover the rates to and from Chicago; and if the offer excludes all of the voluminous other material in these tariffs.

Mr. Gladson: Well, Mr. Examiner, my offer was not a trick offer in any sense of the word. I want all of the tariff provisions which pertain to the transportation of livestock to and from Chicago, and the switching district of Chicago.

Exam. Carter: If I understand your purpose correctly, Mr. Gladson, in offering these tariffs which have been referred to by Mr. Heinemann, insofar as transportation to and from Chicago is concerned, it is to show the manner [fol. 828] in which the railroads publishing tariffs containing the rates to and from Chicago, treat the Union Stock Yard & Transit Company, in those tariffs. If that is the purpose, then I will receive in evidence the portions of those tariffs which show the rates to and from Chicago, and the manner in which those railroads in these tariffs treat the Union Stock Yard & Transit Company.

Now, in some further explanation of that, I will say this, that there are not in evidence any of these tariff provisions which contain instructions, or provisions as to the manner of delivery of livestock shipments, for instance, originating at Chicago and delivered to some destination shown in the

tariffs; nor do I consider in evidence any particular arrangements which might exist in connection with the originating of livestock shipments destined to Chicago.

Mr. Fulbright: At point of origin, you mean.

Exam. Carter: At point of origin, yes.

Mr. Fulbright: Yes.

Exam. Carter: Now that restricts pretty closely, it seems to me, the tariff provisions in these tariffs that are in evidence.

Mr. Fulbright: If the Examiner please, I am sure you do not intend to convey, by the statement you made, that where the tariff contains provisions which do not themselves name Chicago as a destination, but that apply in connection with traffic moving to Chicago, such as the Pacific Freight Bureau [fol. 829] tariffs,—that would be admitted, insofar as it made, by cross-reference or otherwise, reference to delivery at Chicago.

Exam. Carter: Yes, I would think so. Let us take an illustration, which may illustrate that point. Suppose the rate were made on combination; that is, the rate to Chicago were made combination on some point, and the tariff, on the first arm of the transportation, did not name Chicago.

Mr. Fulbright: That is what I had in mind.

Exam. Carter: That provision, in that first tariff, would be in evidence.

Mr. Fulbright: Yes.

Exam. Carter: Any provision by which the rate to Chicago would be arrived at, from the origin in the first tariff, would be in evidence.

Mr. Fulbright: And in speaking of rates, of course that includes the rules and regulations in connection therewith.

Exam. Carter: That is, anything that shows the manner in which the rate is to be constructed, and the way in which that tariff treats the Union Stock Yard & Transit Company, if it does treat it at all.

Mr. Gladson: I wonder if I might have the Examiner's original statement read back to me by the reporter.

Exam. Carter: Surely. Just read my statement to counsel, please, Mr. Reporter.

(The record was read by the reporter.)

[fol. 830] Exam. Carter: There is just one thing that to my mind may not be altogether clear. When I spoke of de-

livery, I did not mean provisions relating to delivery at Chicago——

Mr. Fulbright: Certainly not.

Exam. Carter: —of inbound shipments, or outbound shipments at Chicago.

Mr. Fulbright: No.

Mr. Gladson: If the Examiner please, by "Chicago", do you mean the Chicago switching district?

Exam. Carter: Well, I am inclined to think that the only materiality of such evidence would be that relating to delivery to the Union Stock Yard & Transit Company. That is my inclination at the present moment. I am not entirely certain about that point, however; but I will admit it to "the Chicago District."

Mr. Gladson: And also from the Chicago district.

Exam. Carter: Yes. But I want to make this observation, that I am very doubtful of the materiality of evidence as to any delivery other than to the Union Stock Yard & Transit Company.

Mr. Gladson: Well, Mr. Examiner, I have made what I conceive to be a proper offer, and rather than have your ruling on the basis of an understanding with counsel, I would rather have it, if you feel that way, a positive ruling, that it is admitted.

[fol. 831] Exam. Carter: Very well; I will make that ruling, that I admit that portion of the evidence referred to in my previous statement. I will receive that evidence.

Mr. Gladson: And may I preserve an exception, if the Examiner please, to the extent that such reception is not as broad as my offer.

Exam. Carter: Yes, sir. The record may show your exception. We will adjourn at this time until next Monday morning at 9:30 o'clock, A. M.

(Whereupon, at 12:30 o'clock P. M., June 12, adjourned until June 14, 1937, at 9:30 A. M.)

[fol. 832] Chicago, Illinois, June 14, 1937.

Before: Paul O Carter, Examiner

Hearing resumed at 9:30 o'clock A. M.
Appearances: As heretofore noted.

Proceedings

Exam. Carter: Mr. Gladson, you may proceed.

C. B. HEINEMANN, previously sworn, resumed the stand and testified further as follows:

Direct examination (continued):

Mr. Gladson: Mr. Examiner, Mr. Hamilton called my attention to the fact that Exhibit No. 23, which is a copy of the average demurrage agreement had not been offered. If it has not been received, I want to offer it.

Exam. Carter: That is a copy of the average demurrage agreement?

Mr. Gladson: That is right.

Exam. Carter: It will be received.

(Respondent's Exhibit 23, Witness Heinemann, received in evidence.)

By Mr. Gladson:

Q. Mr. Heinemann, will you, for the purposes of identification, refer to the various sheets of Exhibit No. 24, and point out the items which pertain to rates on livestock to [fol. 833] the various markets posted by the Secretary of Agriculture as public markets under the Packers and Stock Yards Act?

Mr. Smith: Just a moment, Mr. Gladson, does that involve the reading of these portions of this manuscript from which the witness read the other day, which were not read by him?

Mr. Gladson: I would not describe it as the reading of portions of a manuscript, as described by you, but he has already told us that these tariffs contain livestock rates to many points, and in order to identify the remaining portions of these tariffs which I want to later on offer, I am asking him to identify the items which pertain to rates pub-

lished to posted markets. It is merely a matter of identification, and my offer will come later.

I have in mind that these are complicated tariffs, and we have a tariff expert, and I would like to have him identify the items which pertain to the other posted markets, in order that the record may be clear as to what we later on will offer.

Mr. Smith: May I make a suggestion off the record?

Exam. Carter: Go ahead.

(Discussion outside the record.)

Exam. Carter: On the record. Mr. Smith has made the suggestion that the data referred to in counsel's question of Mr. Heinemann be submitted in the form of an exhibit. I think that is a very good suggestion, and it will segregate [fol. 834] and separate this data from the other data upon which we have ruled. Therefore, I suggest that that be done. That can be done, can it not, Mr. Heinemann?

Mr. Fulbright: May I ask, Mr. Examiner, if that exhibit will be prepared in such a way as to indicate the portions of the exhibit which have not been admitted? We are now seeking an identification with an explanation of what they are so as to make it in concrete form rather than merely disconnected references. Now, if we can put it in that form, it will take some little bit of time to do it, but it would be an intelligible form, and that is what we want to do, is to get an intelligible identification of the matter which we desire to offer.

Of course, it is for the purpose, I might say, Mr. Examiner, of showing the practice of these respondents with respect to other stock yards where their rates admit that they have this loading and unloading service.

Exam. Carter: I cannot pass on the question of whether the exhibit is in proper form or not until I see it, but, as I understand, what you desire to do, is to have Mr. Heinemann make reference to these particular tariff provisions. Now, do you mean by that, for him to quote those provisions?

Mr. Gladson: No, Mr. Examiner.

Exam. Carter: Now, just let me see if this isn't right; do you mean for him to make reference to those particular [fol. 835] provisions of the tariffs with such explanatory comment as will be necessary to make those provisions intelligible? Is that it?

Mr. Gladson: That is right. So, Mr. Examiner, that someone who picked up these exhibits and looked at Mr. Heinemann's testimony, could tell the portions which pertain to the rates on livestock to these other posted markets.

Now, I think Mr. Heinemann would probably save time if he went ahead on that at this time, because until these portions are identified, why, we cannot offer the exhibit in evidence.

Exam. Carter: Of course, I do not know what Mr. Heinemann has here, but I think, inasmuch as this is testimony about which you have some indications as to what my ruling will be, I think it would be better to have that in separate form.

Mr. Gladson: It is not testimony.

Exam. Carter: It is not testimony?

Mr. Gladson: The purpose of it is merely to identify the exhibit so that he can offer such additional tariffs when he has concluded.

Exam. Carter: He is going to make comments in connection with the identification, is he not?

Mr. Gladson: Well, merely explanatory comments.

Exam. Carter: I don't know, this word "explanatory" is rather broad. What do you propose to do, Mr. Heinemann? [fol. 836] Can you give us just a brief idea? I do not think we need to spend very much time on this.

The Witness: Mr. Examiner, in the deletion of certain sentences and phrases and entire paragraphs from the narrative description of Exhibit No. 24, for me now to attempt to make an exhibit containing only that deleted material would, of course, not make sense. I do not believe any tariff man would undertake to take that uncompleted abstract and derive any information from it.

My effort has been in this memorandum on which I was working and which can be completed within a day or so, so far as my work is concerned, that I have attempted to take the tariffs where rates, rules and regulations applicable to these other public markets are involved and properly identify the tariff number, the page number, the schedule or item number, and briefly describe what that particular item covers, and I believe with that memorandum, applying to these outside markets—which I shall call outside markets—you would have very much the same sort of

an explanatory narrative as we undertook to furnish on behalf of the Chicago situation.

Exam. Carter: Suppose we start on this and see what develops.

The Witness: Do you mean for me to read it?

Exam. Carter: Yes.

The Witness: Well, units 1 and 2 were used in their en- [fol. 837] tirety, so they will not have to be again referred to. Those were Mr. Sperry's tariffs.

Unit No. 3——

Mr. Gladson: This is Exhibit 24?

The Witness: That is right, and it covers the Alton Railroad Tariff 1860-K, I. C. C. No. 93.

This tariff names rates between stations in Illinois on the Alton Railroad and connecting lines. Also between stations on the Alton in Illinois on the one hand and stations in Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania and West Virginia, and contains these schedules:

Item 90 covering shipments to and from Union Stock Yards district, Illinois, showing that shipments shall be subject to charges shown in Agent R. A. Sperry's tariff 20 T, I. C. C. No. 242, or successive issues.

Item 95, governing shipments to and from National Stock Yards (East St. Louis), Illinois, showing that the absorption of switching charges shall be found in Alton Railroad tariff 2-M, I. C. C. No. 55.

Item 120, containing the usual omnibus cross reference schedule making general reference to other tariffs covering various services including loading and unloading, to which this tariff is subject.

Alton Railroad tariff 28-H, I. C. C. 95.

This tariff names rules and regulations. I was permitted [fol. 838] only to describe in part these rules, and the following schedules would be in addition thereto.

Item 80, page 4, governing absorption of loading and unloading livestock at Bloomington Stock Yards at Kayem, Illinois, of $1.00 per car.

Item 85, page 5, governing absorption of loading and unloading livestock at Dwight Stock Yards, Panyo, Illinois, of $1.00 per car.

Item 90, page 4, governing absorption of loading and unloading livestock at Peoria, Illinois, of $1.00 per single deck and $1.50 per double deck. The stock yards at Peoria

is not served by the Alton Railroad, but by tracks of the Peoria & Pekin Union Railroad.

Item 95, page 5, covering loading and unloading of livestock at the Mississippi Valley Stock Yards, in St. Louis, Missouri, of $1.00 per car, and those yards are not served by the Alton Railroad but by the Terminal Railroad Association.

Item 100, page 5, covering allowance for loading and unloading of livestock at National Stock Yards, Illinois, $1.00 per car. Those yards are not served by the Alton Railroad, but by the East St. Louis Junction Railroad.

Item 105, page 5, covering loading and unloading of livestock at Springfield, Illinois, of $1.00 per car, and that the stock yards at Springfield, Illinois, are not served by the Alton Railroad, but by the Springfield Terminal Railway. [fol. 839] Item 75-B, page 2, of Supplement No. 7, covering the loading and unloading of livestock at Kansas City, Missouri, of $1.25 per single deck; $1.50 per double deck. The Alton Railroad rails do not reach the Kansas City Stock Yard Company except through the use of an intermediate carrier, thence over the tracks of the Kansas City Connecting Railroad.

The Bloomington Stock Yards at Kayem, Illinois, and the Dwight Stock Yards at Panyo, whose loading and unloading charges are absorbed, are not now and never have been posted by the Secretary of Agriculture as Public Live Stock Markets.

Unit 4. The A. T. & S. F. Railway Company.

Mr. Fulbright: Before reading all of that data, the exhibits in connection with the Alton Tariffs show the deduction of line haul rates to the respective destinations there, the same as shown to Chicago?

The Witness: With this exception, Mr. Fulbright, Chicago is the only point where they have what I would describe as a universal reciprocal switching tariff to which all lines make appropriate cross reference in their line haul or committee issues. At most of the other points, with the probable exception of South St. Joseph, which is also a committee issue of a different sort, the lines in their own switching and terminal absorption tariffs provide for delivery to those yards.

At some of the yards there is the necessity for absorbing intermediate and terminal switching in order to reach these

[fol. 840] facilities, whereas at Chicago that is purely a trackage on that inbound livestock, and at points such as Kansas City it is trackage in every instance, with some seven lines absorbing intermediate switching to reach the trackage serving the chutes but in every instance in the case of all of the Chicago lines serving these other markets, they provide for through rates between those market facilities and points on or via their rails, just as provided here in Chicago, although, as I say, there may be a more circuitous route at one place than the other.

Mr. Fulbright: What I am undertaking to develop is this: Do the tariffs in Exhibit 24 which have been admitted in evidence show the deduction of the line haul rates from points on the Alton and these various other lines to Chicago to the destinations, and the respective absorptions, and so on, that you have referred to in connection with the line haul rates so published. What I was getting at or undertaking to develop was whether or not the tariffs in Exhibit 24 show the line haul rates to the other markets and were published to all those other points and destinations just as in the case of Chicago, Kansas City, East St. Louis, Sioux City, and so forth?

The Witness: That is true.

Mr. Fulbright: And that is reflected in that exhibit?

The Witness: Yes, sir.

Mr. Fulbright: Exhibit 24?

[fol. 841] The Witness: Yes, sir.

Mr. Smith: Mr. Examiner, may I say a word here? Of course we all understand perfectly that in the guise of identifying these exhibits, a great deal of evidence is being offered here that has nothing to do with the identification of any documents offered. Now, I should like not to be forced to interject here, as Mr. Heinemann proceeds, with reference to all material of that character, but if I might save the objection and exception, I should like to move later that none of this material be considered as being in evidence, except those portions of it which can be said to be reasonably necessary to actually identify the exhibits which the respondent states it is in the process of identifying.

Will the Examiner rule that if that objection is not made currently it can be considered later when it is made at the conclusion of Mr. Heinemann's statement?

Exam. Carter: I will, Mr. Smith.

Mr. Fulbright: I might say for the benefit of counsel that that is to be restricted as to what the exhibit shows.

The Witness: Unit 4. The A. T. & S. F. Railway Company.

A. T. & S. F. Circular 2240-G, I. C. C. 12552.

This tariff shows rules and instructions governing the transportation of live stock, and under my restriction I was permitted to describe in part only the material contained therein. It also contains the following described schedules:

[fol. 842] Item 265-A, page 3, Supplement 8 thereto, contains a definition of the term "Public Stock Yards", and a list as published therein. This list contains a total of 106 points at which the A. T. & S. F. Railway recognizes the stock yards as "Public Stock Yards", and that list contains the following points, at which there are no stock yards posted by the Secretary of Agriculture as Public Stock Yards:

Albany, New York; Augusta, Georgia, Benning, D. C. This latter point was at one time posted by the Secretary but it has been de-posted.

Bristol, Virginia-Tennessee; Columbia, South Dakota, which I believe to be a typographical error, and it probably refers to Columbia, South Carolina; Hawarden, Iowa; Sparta, Kentucky, and Trevor, Wisconsin.

Unit 5. The B. & O. Railroad Company

The following tariffs of the B. & O. Railroad Company contain live stock rates and refer by cross-reference to other tariffs providing for the absorption of loading and unloading charges on live stock moving under rates published therein from or to the posted Public Markets covered in each tariff.

B. & O. Railroad H-2218-T, I. C. C. W. L. 10410, covering rates from stations on the B. & O. Railroad to points in Illinois and St. Louis, Missouri.

B. & O. Railroad Company I. C. C. 22035, covering rates from B. & O. Railroad stations to points in Illinois, Indiana, [fol. 843] Iowa, Kentucky, Maryland, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia, Wisconsin and Canada.

B. & O. Railroad Company, I. C. C. 22410, covering rates from B. & O. Railroad stations to points in Delaware, District of Columbia, Kentucky, Maryland, Massachusetts, New

Jersey, New York, Pennsylvania, Virginia and West Virginia.

These three tariffs refer to B. & O. Railroad Circular 640, I. C. C. 22648, which contains instructions, Instructions Relative to the Transportation of Live Stock and these include, among others, the following schedules:

Rule 23, pages 21, 22 and 23, which govern live stock loading at point of origin and unloading at destination. Sections a-1 and a-2, page 21, provide that the carrier will load and unload ordinary live stock without extra charge therefor to the shipper, consignee, or owner at the Public Stock Yards defined in Section (i) and listed in Section (j); the list published in Section (j) includes 22 separate stock yards operating in nineteen separate points. The list includes, among other stock yards, the following which are not posted Public Stock Yards:

Belpre Stock Yards, Belpre, Ohio, a feeding station on the St. Louis division of the B. & O., across the river from Parkersburg; Connellsville Stock Yards, Connellsville, Pennsylvania, being a station on the main line of the B. & O., between Chicago and the east; Guyton & Harrington Mule [fol. 844] Company, Yards, East St. Louis, Illinois; K. & I. Stock Yards, Louisville, Kentucky; Union Stock Yards (Benning), Washington, D. C.; Wheeling Union Stock Yards, Wheeling, West Virginia.

Rule 24, Items 1-(a) to (i), cover rules on the delivery of live stock in New York, Brooklyn and Jersey City, and paragraph (a) states that the Central Union Stock Yards will be the delivering agent in that district. The Central Union Stock Yards is not now and has never been a posted Public Stock Yards and does not now and never has filed any tariff with the Interstate Commerce Commission.

Item 2 covering Philadelphia, and item 3 covering Baltimore, and item 4 covering Washington, D. C., show the nature and extent of delivery facilities for live stock in those respective cities.

Mr. Smith: Will you read again the statement about some agencies that have never filed a tariff with the Commission?

The Witness: The Central Union Stock Yards is not now and has never been a posted Public Stock Yards, and does not now and has never filed any tariff with the Interstate Commerce Commission.

Mr. Smith: I just called attention to that as being a typical part of his testimony which has nothing to do with the identification of any exhibit which is proposed to be offered. That is the type of thing I shall refer to later.

[fol. 845] The Witness: Unit No. 6, C. & O. Railway, no additional data.

Unit No. 7, C. & E. I. Railway Company, no additional data.

Unit No. 8, Chicago & Erie Railroad Company.

Erie Railroad Company tariff 1181-E, I. C. C. a-7355 contains rules governing diversion or reconsignment of live stock at Buffalo, Cleveland, East Buffalo, and Marion, and rule 10 on page 3 thereof provides that charges for feed, water, or any other services rendered at those points will be in addition to the freight rate.

Erie Railroad tariff 2108-E, I. C. C. 19202, contains rules and regulations and terminal charges governing live stock, and Rule 25, page 6, describes the services performed by the Jersey City Stock Yards Company, and Rule 26, page 7, the service performed by the East River Live Stock Terminal Company, both operating in the New York district.

Item 5, page 2, of Supplement No. 8, provides for an allowance paid by the Erie Railroad to the contractor who operates the Erie Railroad Stock Yards at East Buffalo, New York.

Unit 9—C. & N. W. Railway System

C. & N. W. tariff 16908, I. C. C. 10177, in Item 55, page 9, and C. & N. W. tariff 16909-A, I. C. C. 10484, in Item 60, page 8; each of these items provide in substantially the same form the method of applying rates on live stock to South St. Paul, Minnesota.

[fol. 846] Unit 10—C. B. & Q. Railroad

C. B. & Q. 3652-W, I. C. C. 18815, Item 320, page 20, lists the location of stock yards. The list includes 33 points, at which stock yards are located. Of the 33 points named, the following are points at which no posted Public Stock Yards are located:

Brush, Colorado; Burlington, Iowa; Calumet Park, Illinois; Clyde, Illinois; Creston, Iowa; Des Moines, Iowa; Galesburg, Illinois; Montgomery, Illinois; Nebraska City,

Nebraska; Alliance, Nebraska; Aurora, Nebraska; Casper, Wyoming; Graybull, Wyoming; Laurel, Montana; Quincy, Illinois; Minnesota Transfer, Minnesota; Rochelle, Illinois; Ashland, Nebraska; Hastings, Nebraska; Lincoln, Nebraska, and Sterling, Colorado.

The list also shows "South Omaha, Nebraska, (The South Omaha Terminal Railway)".

C. B. & Q. 15025-E, I. C. C. 13354, names rates on live stock between Nebraska, Kansas, Colorado, Wyoming, Montana, and South Dakota, on the one hand, and Omaha, South Omaha, Nebraska City, Council Bluffs, Sioux City, Atchison, Kansas City Stock Yards, Leavenworth, Kansas City, St. Joseph, South St. Joseph, St. Joseph Stock Yards, Denver and Pueblo, on the other hand. The tariff indicates that it is governed by C. B. & Q. 3652-W, I. C. C. 18815, which provides for the absorption of loading and unloading charges at all public market origins or destinations.

[fol. 847] C. B. & Q. 6700-K, I. C. C. 18806, and C. B. & Q. 17800-K, I. C. C. 18713, name rates on live stock from and to the points covered in each. Both tariffs by proper provision are governed by C. B. & Q. 3652-U, I. C. C. 18560, or successive issues, which provides for the absorption of loading and unloading charges on all ordinary live stock from or to public stock yards.

Mr. Hamilton: Will you read that last tariff reference he gave, Mr. Reporter?

(The record was read as follows: "are governed by C. B. & Q. 3652-U".)

Mr. Hamilton: Should that not be 3652-V?

The Witness: Yes, I cannot tell my "U's" and "V's" apart.

Units 11 and 12, no data.

Unit 13, C. M. St. P. & P. Railroad.

C. M. St. P. & P. 17010-B, I. C. C. B-6526; Supplement 17 to that tariff, in Item 330-D, page 9, provide schedules for the application of the rates named therein to South St. Paul.

Supplement 18 to C. M. St. P. & P. 17009-B, I. C. C. 6612, provides for the absorption of unloading and reloading on live stock handled through South St. Paul.

Unit 14, C. R. I. & P. Railroad; Unit 15, C. C. C. & St. L.; Unit 16, Grand Trunk Railway; Unit 17, I. C. Railroad, and [fol. 848] Unit 18, M. C. Railroad, no additional data.

Unit 19, M. St. P. & Sault Ste. Marie Railway Company, tariff 344-B, I. C. C. 6582, in Items 150 and 160, on page 8, provides for the method of handling shipments at St. Paul and South St. Paul.

Unit 20, the New York Central Railroad Company, and Unit 21, New York, Chicago & St. Louis Railway, no additional data.

Unit 22, Pennsylvania Railroad.

P. R. R. 1697, I. C. C. 1003, page 29, indexes Jersey City Stock Yards as a station, and page 39, item 25, refers to P. R. R. I. C. C. 940 for rules and regulations governing deliveries in New York, Brooklyn and Jersey City.

P. R. R. tariff 393-S, I. C. C. 396, Item 95, page 18, provides for the application of their rates at the National Stock Yards, Illinois.

P. R. R. Railroad tariff 999-A, I. C. C. 1306, page 13, Item 125, lists the names of the Public Stock Yards on the Pennsylvania Railroad. This list includes Benning, D. C., and Rosslyn, Virginia. Benning, D. C., I have already described, and Rosslyn, Virginia, is just across from Washington, at the south end of Key Bridge. Neither of those yards are posted by the Secretary of Agriculture, and the Rosslyn yard has never been so posted.

P. R. R. tariff 596-B, I. C. C. 1728, covers the diversion and reconsignment of live stock at Baltimore, Jersey City, [fol. 849] Lancaster, Philadelphia, Pittsburgh and Washington.

Page 2 lists the so-called public yards, and the list includes Washington, D. C. (Benning), although that is not a posted stock yards.

P. R. R. tariff 225-F, I. C. C. 1235, contains a number of rules, including transit privileges on live stock.

Section 6, pages 81 to 83, contains the rules governing transit on live stock at Erie, Pittsburgh, and Oil City, and points west thereof.

Item 1360 provides that the charges for feed, water or other service rendered live stock at the stopping point, shall be in addition to the freight charges.

Items 1410 to 1445 of Section 6 apply at Indianapolis.

Unit 23, Pere Marquette, no data.

Unit No. 24, Wabash Railway, contains rules and regulations on state and interstate traffic.

Page 10 of Wabash Railway tariff Q-6942, I. C. C. 995, is reproduced to show Item 115, which covers live stock loading

and unloading in Canada, the charge set out therein being $1.00 per deck.

Item No. 120 covers the loading and unloading of live stock at St. Louis, Missouri.

By Mr. Gladson:

Q. What do you mean when you say no additional data?

A. I mean that I have included the data in Exhibit 24 in [fol. 850] my original narrative as coming within the restriction limiting it to Chicago.

Mr. Fulbright: Those tariffs, however, do show rates to other markets than Chicago?

The Witness: Oh, yes.

Mr. Fulbright: As well as the New York Central?

The Witness: Yes.

Mr. Fulbright: There is no additional data on the New York Central?

The Witness: There is nothing added to what I have already said in my original narrative on the New York Central.

Mr. Fulbright: No additional data.

The Witness: That is right.

Unit No. 25—Western Trunk Lines. I have referred to that but I did not notice Kipp's tariff 236-H, I. C. C. A-2797. On page 24, Item 600, section 2 thereof, it lists the points at which stock yards where the loading and unloading may be absorbed, are located.

Unit No. 26, Central Freight Association.

In my description of Agent B. T. Jones, tariff 218-J, I. C. C. 2874, I omitted from the application the fact that the tariff applied from Peoria, National Stock Yards, Indianapolis, Dayton, Toledo, Detroit, Cleveland, Cincinnati and Louisville, as well as scores of small markets to eastern markets and slaughterers.

[fol. 851] I also omitted to state that this tariff is also used in constructing rates from points west of Chicago, Peoria and the Mississippi River to eastern points.

Agent Jones' tariff 400-N, I. C. C. 2964, the title page reproduced, showing that it contains rates on commodities including live stock, from Cairo, Gale, St. Louis, Thebes, East St. Louis, and other points named, to points in Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, West

Virginia and Canada. That tariff is governed by Official Classification and by Agent Jones' 130-X, I. C. C. 2845.

Pages 17 and 79 are reproduced to show that National Stock Yards, Illinois, is treated as a station on the lines shown. The National Stock Yards is served by the East St. Louis Junction Railroad.

Page 34 is reproduced to show that the East Buffalo Stock Yards are indexed as a station.

Page 260 is reproduced to show a specimen page to indicate the method of publishing the rates.

Agent Jones' tariff 201-V, I. C. C. 2868, has not been reproduced, but I can define it with sufficient clarity to identify it.

It covers rates on commodities from the Ohio River crossings to St. Louis, East St. Louis, Cairo, Gale, Thebes, Evansville, and Upper Mississippi River crossings, and also contains live stock mileage rates.

[fol. 852] It is governed by Official Classification and by exceptions as published by Agent Jones' 130-X, I. C. C. 2845, or successive issues.

Section 1, pages 44 to 49, contains the rates on live stock.

Item 40, page 25, contains the omnibus cross reference schedule.

Unit No. 27—Southwestern Lines.

J. R. Peel's tariff 188-B, I. C. C. 2590, page 199, is reproduced to show Item 20, which provides for rates to Omaha, Sioux City, Kansas City, St. Joseph, National Stock Yards, St. Paul and Denver.

The title page and page 19 of Supplement No. 61 are reproduced to show Item No. 190-G, which is the current Item 190 referred to in Item 310. This list of posted public markets shows Trevor, Wisconsin, which has never been posted as a public market.

J. R. Peel's Tariff 131-J, I. C. C. 2646 covers rates on horses and mules between points in Southwestern states shown, as well as states in the Southeastern part of the United States. The title page indicates the states embraced in this tariff.

Page 53 is reproduced to show Item 135, which contains the rule applicable to loading or unloading live stock. It refers to Section 2 of Item 160 for a list of public stock yards and markets.

Page 54 is reproduced to show Item 160, and it will be [fol. 853] observed that only a few of the points listed in

Agent Peel's I. C. C. 2590 are listed in this item. In the points listed are Augusta, Georgia, El Paso, Texas, and Sparta, Kentucky, which are not posted live stock markets.

J. R. Peel's Tariff 7-H, I. C. C. 2843, the title page is reproduced and shows the tariff contains rates from points in the southwest to points on and east of the Mississippi River.

Pages 8 and 9 are reproduced to show Item 33, which defines and lists public stock yards. The list includes the following points at which there are no yards posted by the Secretary of Agriculture: Albany, New York, Amarillo, Texas, Augusta, Georgia, Benning, D. C., El Paso, Texas, and Sparta, Kentucky.

Page 11 is reproduced to show Item 105 which governs the loading and unloading of live stock. Under paragraph (a) the carriers would absorb the loading or unloading at the points listed under Item 33 non-market points.

J. R. Peel's Tariff 187-G, I. C. C. 2840. The title page is reproduced and shows the tariff contains live stock rates between points in the Southwest and points *in the Southwest and* in other states as shown thereon.

Page 32 is reproduced to show Item 310 which sets out the loading and unloading rules.

The title page of Supplement 8 and page 7 thereof, are reproduced to show Item 190-D. This item defines public [fol. 854] stock yards and public live stock market points. The list includes the following points, and among others it includes the ones I have named as not being public posted stock yards, as follows: Albany, New York; Augusta, Georgia; Benning, D. C., and Trevor, Wisconsin.

J. R. Peel's Tariff 189-E, I. C. C. 2897. This tariff has its title page reproduced to show that it contains rates from Oklahoma, Texas, and New Mexico, to Kansas City, Omaha, St. Joseph, National Stock Yards, Sioux City and St. Paul, in addition to Chicago, which I mentioned Saturday.

Pages 12 and 13 are reproduced to show the definition and list of public stock yards and public live stock markets. The list as shown in Section 2 includes the following points at which there are no posted public stock yards.

Mr. Hamilton: Is that Section 2 of Item 190?

The Witness: Have you got that before you? I think that is it, yes.

As I stated, Section 2 includes the following points at which there are no posted public stock yards: Albany, New

York; Augusta, Georgia; Benning, D. C.; and Sparta, Kentucky.

Page 18 is reproduced to show Item 310, which covers the rules on loading and unloading live stock.

Unit No. 28—Trans-Continental Freight Bureau.

L. E. Kipp's Tariff 52-D, I. C. C. 1389. I have described its general application previously.

[fol. 855] The title page and page 7 of Supplement No. 4 are reproduced to show Item 120-a, which is the definition and list of public stock yards and public live stock markets. The list contains a great many points, including the following which are not posted public stock yards:

Bristol, Tennessee, and Hawarden, Iowa.

Unit No. 29—Pacific Freight Tariff Bureau.

Agent F. W. Gomph's Tariff 220-B, I. C. C. 1209; whose general application was described Saturday. The title page and page 7 of Supplement 5 are reproduced to show Item 270-a, which defines public stock yards and public live stock market points. The item, as revised, eliminated all but the ten more important markets in the far western section where this tariff applies. The former item had listed many other points, but these were not in the territory covered by this tariff.

Unit No. 30—Southeastern Tariffs of Agent Roy Pope.

Agent Pope's Tariff 100-Q, I. C. C. No. 7, contains rules governing live stock and applies as stated on its cover page, only in connection with tariffs making specific reference thereto.

Item 61-a of Supplement No. 3, covers the rules on loading, unloading, feeding, and watering live stock.

(a) provides for the loading or unloading of live stock at public markets.

(h) lists the cities where public stock yards are located. This list contains a great many points, including the follow-
[fol. 856] ing, at which there are no markets posted by the Secretary of Agriculture:

Augusta, Georgia; Albany, New York; Henderson, Kentucky; Madison, Florida; Mobile, Alabama; Orangeburg, South Carolina; Owensboro, Kentucky; Roanoke, Virginia; and Washington, D. C.

Agent Roy Pope's Eastbound Tariff 38-B, I. C. C. No. 45, applies from points in Alabama, Georgia, Kentucky, Louisiana, Mississippi, and Tennessee, as shown therein, to Eastern Trunk Line and Virginia cities.

It is governed by Southern Classification and Exceptions in Agent Dulaney's I. C. C. 60, or successive issues.

The rates on live stock are set out on page 205 to 211, inclusive, Items 9317 to 9725, inclusive.

Item 970, page 140, refers to Agent Pope's Tariff 100-Q, I. C. C. 7, for rules governing live stock.

Item 900, page 139, is the blanket omnibus cross reference rule. Under the application of that tariff, at all public markets included within its general application, the loading and unloading would be absorbed.

Agent Roy Pope's Nashville Eastbound Tariff 121-M, I. C. C. 1857, applies from Nashville, Tennessee, to eastern destinations in Trunk Line and New England Territories.

Item 540, page 53, makes the live stock rates subject to Agent Speiden's 100-P, I. C. C. 1708, or successive issues.

Pages 68 and 69 have the specific rates on live stock.

[fol. 857] Nashville is a public market point, at which is located the Nashville Union Stock Yards, and from that point to eastern destinations where posted public live stock markets are located, the loading and unloading of the live stock would be at the expense of the carrier.

Agent Pope's Mississippi Valley Live Stock Tariff 147-A, I. C. C. 1395, the general application was described in my Saturday's testimony.

Item 806, page 44, covers delivery at Cincinnati Union Stock Yards.

Item 812, page 45, covers delivery at National Stock Yards, Illinois.

Item 800, page 44, makes the tariff subject to Agent Speiden's Tariff 100-N, I. C. C. 1290, or successive issues. Under the application of the tariff the loading and unloading would be absorbed at all these public stock yards included in its application.

Agent Pope's Eastern Edible Live Stock Tariff 211-A, I. C. C. 1855, covers rates on live stock from Nashville, Tennessee, and points in Alabama, Georgia, Kentucky and Tennessee to points in Eastern Trunk Line and New England Territories.

Item 116, page 59, makes the tariff subject to Agent Speiden's Tariff 100-P, I. C. C. 1702, or successive issues.

Pages 60 and 61 carry the rates on live stock.

Under the application of this tariff and the governing [fol. 858] issues, the loading and unloading charges would be absorbed at all public markets included in its application.

Mr. Fulbright: Mr. Heinemann, do I understand that these exhibits, in the instances you have described, include delivery facilities at the named points which are not recognized public markets, or public stock yards recognized as public markets by the Department of Agriculture?

Mr. Smith: That is objected to as immaterial. The documents speak for themselves.

Mr. Fulbright: I am just trying to get the description of the exhibits, merely that.

Mr. Smith: That is objected to as immaterial, on the ground it is not the best evidence of what these documents show.

Exam. Carter: I will sustain the objection.

Mr. Gladson: Mr. Examiner, at this time I want to offer the portions of Exhibit 24 which pertain to rates on live stock to and from stock yards posted by the Secretary of Agriculture, and in making that offer I want to offer collectively and also severally, each item of these various reproduced tariffs with the tariff sheets which pertain to the stock yards mentioned.

I also want to offer in instances where the tariffs have not been reproduced but have been referred to by Mr. Heinemann the portions of such tariffs referred to which pertain to rates on live stock to and from stock yards posted by the [fol. 859] Secretary of Agriculture.

I also want to offer, and each of these offers are collectively and severally, the other portions of the tariffs referred to specifically by the witness in connection with his identification.

Now, I ask the Examiner to withhold his ruling on this, for this reason; we expect to offer presently the exhibits showing the posted public markets which may be necessary in order to connect up my offer of proof and make it specific.

We also expect to show as to most of these markets the conditions and circumstances surrounding the traffic, for the purpose of showing that these comparisons are similar and proper.

Mr. Smith: I understand that pursuant to the request of the Examiner, the method that counsel asserts he has been following here is to simply identify certain exhibits which they desire to offer, with the understanding that then those documents will be offered and a ruling may be made thereon.

There is a good deal of what Mr. Heinemann said while he was purporting simply to identify these exhibits, which could not by any stretch of imagination be said to be limited to the mere identification of certain documents.

His customary practice was to say that a certain tariff was offered to show certain items, and then undertake to state under the pretense of identifying that item as to what the item covered.

[fol. 860] Now, in view of the practice which counsel asserts he has been following, I assume there can be no objection to the Examiner ruling—in any event, I petition the Examiner to rule that this so-called identification which has been made will be received in evidence here not as independently and in and as of itself establishing any of the facts which it is alleged to cover, but will be received absolutely and strictly and only to the extent that it does identify certain documents which are now about to be offered.

Mr. Fulbright: Mr. Examiner, I think we could simplify that in this way: If the ruling of the Examiner, when the matter is presented, is that the exhibit shall not be received, then I think it would be correct to state that those portions which are not strictly descriptive thereof should be excluded or should be considered only for the purpose of describing the exhibit.

On the other hand, if the ruling of the Examiner in the matter is to the effect that the exhibit is received, then it would seem to me proper to receive in connection with it the comments in connection with it, and not to have that all argued the second time.

Mr. Smith: I agree with your statement.

Exam. Carter: Do you want my ruling now or do you want to offer them?

[fol. 861] Mr. Gladson: I asked you, Mr. Examiner, to defer your ruling.

Exam. Carter: Isn't there something else you were going to offer before I made the ruling?

By Mr. Gladson:

Q. Mr. Heinemann, have you a list of the stock yards published by the Secretary of Agriculture, public stock yards, under the Packers and Stock Yards Act?

A. Yes, sir.

Mr. Gladson: I will ask that this document be marked as Respondent's Exhibit 27 for identification.

Exam. Carter: Off the record.

(Discussion outside the record.)

Exam. Carter: Gentlemen, you have just offered an exhibit which you have asked to be marked for identification as Exhibit No. 27. I will not permit that exhibit to be so marked.

Mr. Gladson: Is it clear, Mr. Examiner, that I am merely having it marked for identification, and not offering it at this time?

Exam. Carter: Your offer is to have this list of stock yards within the jurisdiction of the Packers and Stock Yards Act marked as Exhibit No. 27 for identification, and my ruling is that I will not permit it to be marked with any number for identification.

Mr. Fulbright: How shall we identify it, Mr. Examiner, when we discuss the admissibility?

[fol. 862] Exam. Carter: It is entitled "List of Stock Yards within the jurisdiction of the Packers and Stock Yards Act".

Mr. Fulbright: Correct.

Mr. Gladson: May I preserve an exception to the Examiner's ruling that he will not even have it marked for identification?

Exam. Carter: Yes.

By Mr. Gladson:

Q. Mr. Heinemann, have you made an investigation of the conditions surrounding the operation of the Stock Yards at Sioux City, Iowa?

Mr. Smith: Objected to as immaterial.

Exam. Carter: I sustain the objection.

Mr. Gladson: I offer to prove by this witness, if he is allowed to testify, that he has made such an investigation.

Mr. Smith: Same objection.

If there is no objection to it, Mr. Examiner, I think that the record might be made to show that in each instance where an exception is made, it is explained and followed by an offer of proof, that the same objection is made to the offer of proof.

Exam. Carter: The offer is denied.

Mr. Gladson: I am prepared to offer proof, Mr. Examiner, in each instance where the ruling is adverse, and I want to preserve a specific exception.

Exam. Carter: Yes.

[fol. 863] By Mr. Gladson:

Q. Mr. Heinemann, have you a number of exhibits that you have gathered and prepared, which throw light upon the operations of the stock yards at Sioux City, Iowa?

A. I have.

Q. And will you tell us the name of the company which operates the stock yards at Sioux City?

A. The Sioux City Stock Yards Company.

Q. Will you tell us whether or not this Stock Yards Company is served by certain trunk line railroads?

Mr. Smith: That is objected to as immaterial.

Exam. Carter: I sustain the objection.

Mr. Gladson: I offer to prove by this witness that the Sioux City yards is served by seven trunk line railroads, four of which also serve respondent's property at Chicago, and are protestants in this case, the four being the Chicago, Burlington & Quincy Railroad, the Chicago & North Western Railway Company and its trustee, the Chicago, Milwaukee, St. Paul & Pacific Railway and its trustees, and the Illinois Central Railroad Company.

Exam. Carter: The offer is denied. Now, I want to ask you, Mr. Gladson, are you going to attempt to present the detail of what you attempt to prove in respect of all of these yards, the Sioux City yards and the other stock yards companies?

Mr. Gladson: Yes, I expect, Mr. Examiner, to show by [fol. 864] specific offers of proof what the witness would testify to if he was permitted to go ahead.

Exam. Carter: As I understand it, what you are now going to attempt to prove are the practices in existence at Sioux City and other stock yards throughout the country?

Mr. Gladson: And I want to show that the conditions surrounding the operation of the stock yards at Sioux City are similar to the operations in the principal centers.

Exam. Carter: I mean, you want to show what the conditions are at these other stock yards, for the purpose of showing some similarity between conditions at these stock yards and the conditions at the Union Stock Yards in Chicago?

Mr. Gladson: That is right.

Exam. Carter: I am not inclined to permit you to go into that field, and if you want to argue the matter before I rule, I will hear the argument.

Mr. Gladson: As far as Sioux City is concerned, I would like to develop a few more general facts about the operation there, if I may.

Exam. Carter: Before we go any farther on that point I would like to hear argument in respect to the supposed state of facts you desire to make in argument. I might think the proposition is clear, at least it is clear to my mind, that you desire to show the conditions at other stock yards throughout the country, for the purpose of showing simi- [fol. 865] larity to the conditions at Chicago, and that you consider that material to the issue as to whether or not the Union Stock Yard & Transit Company is a common carrier subject to the Act. That is the general purpose of this statement that you are now about to offer, is it not?

Mr. Gladson: I would much rather have in mind——

Exam. Carter: I mean, can you answer my question, or is that the general purpose?

Mr. Gladson: That is one part of it, Mr. Examiner.

Exam. Carter: What are the other purposes?

Mr. Gladson: Well, I have in mind that I want to show the barter and trade method of fixing the loading and unloading charges as between the railroads and stock yards, on which the Commission commented in its order in I. & S. Docket 4109, had worked out without hardship to the railroads, particularly at Sioux City. That is one of the things, and in connection with that I want to show the conditions and circumstances are similar at Sioux City to what they are at Chicago.

There has been considerable comment about the bottle neck conditions at Chicago as far as live stock handling and marketing is concerned. I want to show that at Sioux City for all practical purposes the position of the Sioux City

Stock Yards as a terminal of the trunk line railroads is the same as it is at Chicago.

I want to show the practice of the Secretary of Agriculture [fol. 866] at the various markets in so far as permitting the publication in the tariffs of items covering loading and unloading, which the Commission apparently considered important, whether or not he had jurisdiction; and I also want to show as was brought out at the first hearing, what the practical construction of the Act has been by the Interstate Commerce Commission over a period of years.

Now, in connection with Sioux City we have got a very complete set of exhibits which show what the situation is. I would like to have these exhibits marked for identification so that when I offer same there will be something specific before the Examiner for his ruling.

I would like to develop by this witness the investigation he has made of the Terminal Railroad Company that serves these Sioux City stock yards. I want to show what the relation is between this Terminal—that is, the corporate relationship between this Terminal and the Stock Yards Company.

Now, the only way that I know that a lawyer can get a ruling on evidence is to have something specific before the Examiner or the Court, on which he can rule.

Mr. Smith: May we know at this time from counsel whether he proposes to make that showing or a similar showing with reference to any points other than Sioux City?

Mr. Gladson: Oh, we have a number of points where we are going to make some showing, certainly.

[fol. 867] Mr. Smith: There was some statement, as I recall, by Mr. Shaw or by Mr. Henkle at the previous hearing, that you proposed to make such showing with respect to some 100 or 139—I do not recall the number, but some large number of points. Now, is that your purpose?

Mr. Gladson: Mr. Smith, we expect to make a detailed comprehensive showing as to a considerable number of the important live stock markets, central markets. We do not expect to show all the detail, as I have referred to it in connection with Sioux City, at all these 125 markets. In other words, if the Examiner decides to receive this evidence, I do not want to give the impression that he is going to be here a week or ten days. It is detailed and specific and pertinent, but I do not want the Examiner to

get the impression it is going to take us a month to put in the evidence if he allows it to go in.

Mr. Smith: Now, counsel has been frank, I think, and he stated very fully, and I think adequately, just exactly what it is that the respondent desires to put before this Commission, and we object to that showing as being incompetent, immaterial and irrelevant and ask for the Examiner to rule upon it, and if the Examiner deems that the objection is good, I believe that the Commission has control of the making of a record in an investigation set by it, and we ask that no further testimony or exhibits be presented here or [fol. 868] admitted here designed to show any part or all of the purposes as set forth by Mr. Gladson, as irrelevant and immaterial.

Mr. Gladson: Mr. Examiner and Mr. Smith, I have not made any offer of proof.

Mr. Smith: I understand that.

Mr. Gladson: The Examiner wanted to know what was the showing and I told him. Now, I want an opportunity to at least have identified the exhibits which we have prepared and which as I understand, Mr. Smith is going to question, and to which the only objection would be the materiality and relevancy of them, but I would like to have those before the Examiner when I argue this matter whether they should be admitted.

Exam. Carter: I will let you state in the record what exhibits you have, that is, the title of the exhibits you have that you desire to offer in this connection.

Mr. Gladson: Mr. Examiner, I am at a loss in the trial of a lawsuit or even in a hearing before the Examiner of the Interstate Commerce Commission, how I can get a ruling on specific evidence until there is something for the Examiner to rule on that is before him.

Now, we have some exhibits, and I want to have these various exhibits marked so we may get a ruling on them, and something specific.

Exam. Carter: I haven't anything more to say. I have stated if you desire to read into the record the titles of [fol. 869] these exhibits you may do so.

Mr. Gladson: Mr. Examiner, without waiving my objection to what I consider to be a rather arbitrary ruling, but in order that I may have something to argue about, because I am going to argue this point as to the admissibility, I will

refer to the exhibits which I have in connection with Sioux City, Iowa.

I have the articles of incorporation of the Stock Yards Company which serves that property, which show the corporate powers among other things of the company to operate a railroad; I have the renewal of the articles of incorporation of that company in 1934; I have the articles of incorporation of the Terminal Railway Company which serves that property; I have a copy of the valuation report of the Interstate Commerce Commission which shows, among other things, a history of the Terminal Railway Company and the intercorporate relationships between the Stock Yards and the Terminal Railway Company. That is Valuation Docket No. 1058.

I have a map of the Sioux City Stock Yards, which this witness is prepared to identify, the map showing the Terminal Railway tracks and the lay-out.

I have a copy of a lease from the Stock Yards Company to the railroad of certain properties, reserving the Terminal tracks.

I have certified copies of four supplemental leases which [fol. 870] show the detail of the property that is leased to the Terminal Company by the Stock Yards Company, and the terms under which its property is leased, which bring it down to date and cover a long period of time.

I have the certificate of the Secretary of the company which shows the amount of stock issued by the Terminal Railway Company; and another certificate from the secretary which shows the amount of stock of that Railway Company owned by the Stock Yards Company. I have two certificates which show common officers between the Stock Yards Company and the Terminal Railway over a period of years.

I have a copy of the Packers and Stock Yards tariff filed by the Stock Yards Company.

I have a copy of the tariff filed with the Interstate Commerce Commission by the Terminal Railway Company.

I have a certified copy of the contract between the C. B. & Q. and the Stock Yards Company in regard to the unloading of live stock for the Q. at Sioux City by the Stock Yards Company.

I have a copy of a similar contract between the Milwaukee and the Stock Yards Company; between the North Western

and the Stock Yards Company; between the Illinois Central and the Stock Yards Company.

I have certified excerpts, certified by the Secretary of the Commission, from the annual reports filed with the Bureau of Statistics for the year 1914, which show control [fol. 871] of the Terminal Railway Company by the Stock Yards Company.

I have similar excerpts from the report filed with the Interstate Commerce Commission, showing control and ownership of all the stock by the Stock Yards Company of the Terminal Railway for 1925.

I have a similar exhibit showing the information right up to date, 1936.

Exam. Carter: Showing what information right up to date?

Mr. Gladson: Showing that the Stock Yards Company has absolute control of the Terminal Railway, and I will say that this witness has made an investigation, has been familiar with the Stock Yards for years, knows about the operations, has recently visited the Stock Yards again, and is prepared to tell exactly what the circumstances are as far as operations are concerned, or whether or not it is the principal terminal of trunk line carriers, and other information of that kind, and also that this witness has examined the files of the Interstate Commerce Commission, tariff files, and is prepared to testify that the Stock Yards Company which performs the loading and unloading controls the railroad and holds its stock and has common officers and never has filed a tariff with the Interstate Commerce Commission and that the Interstate Commerce Commission has known about that for years.

Exam. Carter: You say this witness is prepared to testify that the Interstate Commerce Commission has known for years——

[fol. 872] Mr. Gladson: That is what the witness will testify orally. Of course, these exhibits will show all of those facts. Of course, also, the valuation reports show that the Commission has known this for a long time, and the annual reports of the Terminal Railway Company.

Exam. Carter: Now, I understand you make the offer to submit those exhibits and accompanying testimony relating thereto, to relate to the Sioux City Stock Yards Company, is that correct?

Mr. Gladson: Now, Mr. Examiner, I want to be responsible to my client for the presentation of this case to the Commission, and perhaps to the courts. I want to make my offer of proof in my own way.

In explanation of the character of my evidence I have made this statement to the Examiner, so that we might have something to argue about. I want to mark these exhibits for identification first, with the intent later on of offering them, and I want to develop through this witness by question and answer method, what facts he knows about the Sioux City Stock Yards situation, and I am told by the Examiner that I cannot have the exhibits marked for identification, and unless I have misundertood the Examiner, I also understand that I cannot develop by question and answer form the specific information concerning the Sioux City Stock Yards which I think will throw light upon what [fol. 873] the facts are.

Exam. Carter: You realize, of course, that the respondent in this proceeding based its petition for reconsideration in I. & S. 4109, in part at least, on the very evidence that you are now attempting to introduce, do you not? Is that correct or not?

Mr. Gladson: Now, just a moment, please. That is in part correct. The petition for rehearing is in evidence, and I say that that is in part correct. However, we have gone much farther in developing the facts and circumstances surrounding these yards than was set forth even in summary form in that exhibit.

Exam. Carter: In that petition for a rehearing you offered to develop the facts to the full extent, did you not?

Mr. Gladson: Well, it nas been a good long time since I wrote that petition for a rehearing, and I do not remember the exact phraseology.

Exam. Carter: I just mentioned that situation, mostly in response to your remark that the ruling of the Examiner perhaps was arbitrary, so that we will have something in the record in that respect.

You have described all the exhibits that you desire to offer in connection with the Sioux City situation?

Mr. Gladson: I have described them very generally.

Exam. Carter: Yes, you have simply given such descrip- [fol. 874] tion as you felt was necessary so they may be identified?

Mr. Gladson: Well, it is covered from the description.

Now, Mr. Examiner, if you do not feel inclined to let me put anything specific before you as to the evidence that we want to prove, and are not going to permit me to identify my exhibits, nevertheless, preserving an exception to the ruling of the Examiner, I want to argue the question of the admissibility of evidence of this type.

Exam. Carter: I will permit you to do that. Of course, if I change my mind, we would have to let all of this in naturally, but I will permit you to do that whenever you want to.

Why not do this: Would you prefer to argue, say, taking the specific Sioux City situation, would you prefer to argue the admissibility of the data you have with respect to that situation now, or would you rather describe the other testimony that you are going to offer and then argue the matter? Which would you rather do? It is up to you.

Mr. Gladson: Well, if the Examiner is going to amend his ruling and let me identify the exhibits or make specific offers of proof of testimony——

Exam. Carter: Why can you not make your argument as to admissibility now? What is to prevent you from doing that?

Mr. Gladson: I will make my argument as to Sioux City, and perhaps that will be determinative of similar evidence.

Exam. Carter: I did not hear that.

[fol. 875] Mr. Gladson: I say I will be glad to cover the Sioux City situation and possibly Sioux City will be determinative of what the Examiner will do in connection with the other——

Exam. Carter: Live stock markets?

Mr. Gladson: —live stock markets. I assume that probably is true, but I am going to make an offer, if the ruling is adverse, to make a showing at these other yards.

Exam. Carter: Yes.

Mr. Gladson: Now, I wonder if Mr. Smith, in order that we may have something so as to confine our argument to some specific point, would be willing to state his objection to testimony of the character that I have referred to at Sioux City?

Mr. Smith: I have not the slightest objection to doing it. We object to the evidence on the ground that it is incompetent, immaterial and irrelevant. The Commission was offered this testimony at the previous hearing, or in

the motion for a rehearing, and denied that petition for a rehearing.

Now, this, as I see it, is an effort to make the Commission receive this evidence whether it wants to or not, after they had attempted unsuccessfully to withdraw this tariff in Docket 4109, and having failed to get the case reopened for the purpose of admitting this testimony, the respondent simply filed another cancelation notice and took that method of getting a rehearing.

[fol. 876] We have sat here in this hearing for three full days up to this point, including the original hearing, developing the facts with reference to Chicago alone. The Supreme Court of the United States has said that the question is a mixed question of law and fact with reference to the situation at Chicago. Now the respondent proposes to insist that this Commission hear some of the testimony with reference to these other markets in the country, or many of them, which they say they will refer to and rely upon as being typical.

I think our position with reference to the matter is sufficiently clear and we stand on the proposition that it is immaterial and irrelevant to the issue here which has to do solely and only with the situation in Chicago.

Mr. Gladson: Mr. Smith, may I inquire as to whether or not you have the technical objection to those various exhibits I have referred to that they are not the best evidence, or is your objection on the basis that they are not material to the issue?

Mr. Smith: I will say as to that, that Mr. Gladson or his office communicated with me some time ago with reference to the matter concerning which he is now inquiring of. I told Mr. Gladson in effect, and with respect to other matters that are not perhaps material here that I was inclined to turn the other cheek so far as that question was concerned. because of my faith in Mr. Gladson's professional integrity, [fol. 877] and that if he would say on this record the exhibits which he proposes to offer were in fact and physically the documents they purport to be, that we would raise no objection to them on the ground that they were not the best evidence, that they were hearsay, or that they were lacking in authenticity, and it will be noted in my objections I have raised that I have made no point as to the question of the authenticity of these documents. I do not think, in view of the position we took as to the materiality of these exhibits

and the contention we have made that they were immaterial, that it would be proper for me to require them to go all over the country and bring them here to establish the authenticity of the record, and I make no point of that.

Mr. Gladson: Now, may I inquire as to whether there are any particular points the Examiner would like to have developed in the argument?

Exam. Carter: You may develop any point you desire to.

Mr. Gladson: I merely asked that question with the thought I might shorten the argument.

Argument by Mr. Gladson:

Mr. Gladson: Now, the first issue, or the first thing, I believe I should discuss is Mr. Smith's statement that we are in effect imposing on the Commission by bringing this other case before the Commission after the decision in Docket 4109.

Mr. Henkle has stated that the law department of his com- [fol. 878] pany is responsible for the method and manner in which this thing was done, and I assume that responsibility, and I have no feeling akin to that of the cat and the canary in bringing this additional proceeding in the manner in which it has been brought before the Commission, because as I read the decisions of the Supreme Court it is a perfectly proper method of proceeding, and if I am wrong about that the blame is mine and my clients are not responsible for it.

Now, the case that I had particularly in mind in recommending this procedure was the case of Tagg Brothers v. The United States, 280 U. S. 420, which had to do with an order of the Secretary of Agriculture which went to the courts, an order against certain commission firms.

The reviewing sections of the Packers and Stock Yards Administration are exactly the same as those pertaining to the review of the orders of the Interstate Commerce Commission, because the provisions which pertain to the orders of the Interstate Commerce Commission are referred to and incorporated by reference in the P. & S. Act.

Now, the question came up in the trial court as to whether evidence should be received by the trial court, and part of this was new evidence in the sense that it had been developed after the hearing before the Secretary, and part of it was evidence that was in existence at that time.

The court said, Mr. Justice Brandeis writing the decision, [fol. 879] that the trial court improperly admitted the evi-

dence. It should have been received before the Secretary.

Now, the court said, beginning at page 443:

"A proceeding under Sec. 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now."

Citing cases.

"On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body."

Now, what I have quoted there is preliminary.

"Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. A rate order is not res judicata. Every rate order made may be superseded by another."

[fol. 880] And the fact that it is not a rate order I do not think makes a particle of difference in so far as procedure before the Commission is concerned, the fact that this does not happen to be primarily a rate case.

And so I say we are properly before the Commission, we are not imposing upon the Commission, and the Commission ought to hear this case and try it just as they try or investigate any proceeding.

In the second place, in offering this evidence I call the Commission's attention to the fact and the Examiner's attention to the fact regarding tne practice as to the admission of evidence before the Commission, as expressed by the Commission itself and by the courts, that it has always been liberal. The Commission has never been bound by the technical rules of evidence so far as I have been able to

discover, and the practice is liberal in order that the Commission may develop all of the facts.

Now, the courts have commented on the fact that an Examiner's position is similar in many respects to that of a Master in Chancery. Mr. Smith knows, and the Examiner, who has practiced before Masters in Chancery knows, that the practice before them in case there is any doubt as to the admissibility of evidence is to let it in subject to the objection, with the thought that if it is improper the court will disregard it, but if there is any doubt about it at all he will let it in, and if it is improper the court will disregard [fol. 881] it, but on the other hand, if he does not admit it a hardship is worked on the party and he has to come back to have another hearing. I am going to ask the Examiner in this case to have that in mind in making his ultimate ruling.

The reasons why I think that the evidence which we have offered to produce is pertinent are several; we have the various different comments of the Commission in Docket I. & S. 4109, about the hardship that might be worked on the railroads by barter and trade methods. We want to show that at these other yards no hardship has been worked on the railroads. In order to make that competent we have got to show the conditions are similar.

The Commission apparently relied upon the fact in its decision in Docket 4109 that the Chicago Yards was a terminal of the railroads. We want to show that the situation in Chicago is no different from what it is at most of the other principal markets.

Confirming what the witnesses testified to as to the inherent nature of the Stock Yards, it requires one terminal for any substantial handling, a thing that the Commission apparently was impressed with in its decision. The Commission found that the Secretary of Agriculture had no jurisdiction over loading and unloading charges. The Secretary of Agriculture is the administrative officer charged with the administration of the Packers and Stock Yards Act. We want to show by this witness that under [fol. 882] conditions that are very similar to Chicago, at many yards, the Secretary of Agriculture allows the Stock Yards Company to file in its P. & S. tariff items covering the loading and unloading charge, which is an indication by the officer charged with that important duty, as to what he believes his jurisdiction is.

Mr. Smith: If I may ask a question at that point, how is it this evidence you want to offer can show at the same time that the barter and trade method works out at other markets, and also that the Secretary of Agriculture has jurisdiction and regulates the rates? I do not put those two things together.

Mr. Gladson: Just a minute. I did not say the Secretary of Agriculture required that filing with the P. & S. in all of its tariffs, but it does permit that at some of the yards. At other yards the stock yards do not include it, and at those yards I want to show that the barter and trade methods have not worked a hardship on the railroads. There are other yards where they have barter and trade methods, and also schedules on file with the Packers and Stock Yards Administration.

Now, there have been a lot of technical objections in this case—I am wrong, perhaps, in this statement, but I have been inclined to think that the Examiner was a little technical in his rulings at times, and above all things, liberal rulings in cases presented before the Commission should [fol. 883] be adhered to. Whatever is going to be the result of this, I call your attention to this, Mr. Examiner, that the protestants in this case have opened the door themselves; at their request the decision of the Commission passing on the live stock rates to Chicago became a part of the evidence in this case. Later on the Examiner ruled in connection with another decision that a decision of the Commission put in evidence could be used for any purpose. Now, in this case the decision in 61 I. C. C., to which I have referred, is the decision wherein the Commission stated that the loading and unloading at the central markets was substantially the same at all the markets.

Getting back now to technicalities in any court of law, it would be held that the protestants having opened the door, cannot object properly to our developing all the facts. That is a purely technical argument, but it is sound and a good argument in any court where technical rules of evidence obtain.

Mr. Smith: Will you identify that decision you refer to?

Mr. Gladson: 61 I. C. C.

Mr. Smith: That, I understand, had to do with the fixing of these various rates, including Chicago?

Mr. Gladson: Exactly. The issues before the Commission at that time were broader than the issues in this case,

and that finding of the Commission is in this record, and not only that, Mr. Smith, but the parties before the Commission in that case were exactly the same as the parties [fol. 884] before the Commission in this case, in this sense, that all of the parties in this present case were before the Commission in that case.

Now, there is another reason in that decision in 4109; there was a very able dissenting opinion written by Commissioner Meyer. Four Commissioners did not participate in that case. Commissioner Meyer, as I read his dissenting report, was impressed with the fact that the situation was the same at these other markets. Even had the evidence in that other case been insufficient to show that, Commissioner Meyer who has been with the Commission for a long time, apparently knew that the conditions were similar. Maybe the other Commissioners were impressed by that fact, but there being nothing in the record about the conditions at these other yards they decided not to go along with a dissenting opinion. Certainly four members of the Commission did not take part in that report.

Now, I say that we have a right to develop the facts referred to by Commissioner Meyer, with the thought that the Commissioners who did not participate in that case, the four of them, may be impressed by Commissioner Meyer's dissent, and also——

Exam. Carter: I think I might——

Mr. Gladson: And also if he did participate the majority of the Commission might be impressed with all the facts as to these other yards before them.

[fol. 885] Exam. Carter: I think I might say at this time,—my recollection may be incorrect,—but I think that the vote on your petition for a rehearing by the Commission was unanimous, in so far as those who participated.

Mr. Gladson: That may well be.

Now, we come to this question of practical construction—before I get into the question of practical construction, however, in view of the fact the Examiner has mentioned, my position is that the filing of the petition for a rehearing certainly is not determinative of the materiality of evidence offered or proved.

Section 16a of the Interstate Commerce Act provides in part:

"That after a decision, order, or requirement has been made by the Commission in any proceeding any party

thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear."

Now, discretion is a broad term. I do not know why the Commission did not want to set the case for rehearing, but it may have been because the matter was in the courts and the Commission thought, "Well, we will let the court decide it." But, the very fact, if the Examiner's understanding is correct, that the decision of the Commission was [fol. 886] unanimous, confirms that particular fact which I have been saying here, in view of the fact that Commissioner Meyer did not vote on the petition for a rehearing.

We have a very analogous case, in the case of the petition for a rehearing before the Supreme Court, where the court has uniformly held the denial of petitions for a writ of certiorari is not determinative. The situation is much the same——

Exam. Carter: I will admit that proposition, Mr. Gladson.

Mr. Gladson: (Reading.)

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

The citation of that case is 260 U. S., 482, at page 490.

I call the attention of the Examiner to the further fact that the specific evidence which we have offered here is much broader than our offer and petition for rehearing. The denial of that petition being a matter of discretion with the Commission, I do not think the Examiner or anyone else can say that that denial precluded us or is an expression of the Commission that this evidence is not material.

I come now to the question of practical construction as an aid and guide to the Commission in determining the meeting of mixed statutes.

The first case I want to refer to is the decision of the Court in the case of the Boston and Maine Railroad v. [fol. 887] Hooker, 233 U. S. 97. Mr. Smith remembers that case, when he was trying cases for the Union Pacific and I was representing the railroads in cases against the railroads.

In that case the question involved was the validity of the limitation contained in the tariffs on liability for loss of

baggage. The court held that such a limitation was one that might properly be contained in the tariff filed under Section 6 of the Act and referred to in tariff circular of the Commission requiring that general baggage regulations be set out in the tariffs. The court said, at page 118:

"This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the Act."

The next case I want to refer to is Louisville & Nashville Railroad Company v. United States, 282 U. S. 740, which had to do with the validity of an order of the Commission in regard to the transportation of business cars or private cars for the executives of other railroads, free of charge. This is, I think, a very concise and clear statement of the rule. The court stated, at page 757:

"The act has been repeatedly amended, and has been re-enacted, without any change directed to the correction of this practice. It is strongly urged that in the light of these circumstances the administrative construction should be determinative. The principle is a familiar one that in the in-[fol. 888] terpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons."

Now, in that particular case the court held the statute was not ambiguous, but that this is a correct statement of the law.

Now, it has been stated in this record that the Interstate Commerce Act is not ambiguous, and the intimation being that the practical construction of the Commission would not be of any assistance to the Commission probably in the light of the principle set out by the court in the case to which I have just referred.

I call your attention now to the fact that common carrier or common carriage by railroads is not defined at any place in the Act, and the difficulties that the courts have had and the Commission has had in its early days and even today, in deciding what is a common carrier and what is not a common carrier shows that a statute where it is not defined, is most likely an ambiguous statute.

I call your attention to the further fact that the fact Commissioner Meyer dissented and the dissenting opinion shows that the statute is not wholly clear.

On that point I have in mind a decision of the Supreme Court in Merchants Warehouse Company v. United States, 283 U. S., 501, 513. The question was whether or not, the [fol. 889] trial court, or the court below should have granted an injunction pending appeal to the Supreme Court, even though the three-judge court decided against those taking an appeal from the order of the Commission, and the Supreme Court said as to the validity of this order:

"Its legality now is not free from doubt, as is indicated by the fact that the judges of the court below were not unanimous."

Before I leave this subject of practical construction, and its value to the courts and the Commission in determining issues of this kind, I want to call attention to the decision of the Supreme Court in Davis v. Manry, 266 U. S. 401. That was a personal injury action against the Director General in which the court was called upon to construe the following language in Section 2 of the Safety Appliance Act:

"All cars • • • having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders."

The question came up as to whether or not there should be grab irons on locomotive tenders, and this is what the Supreme Court said:

"The omission to require a grab iron is a practical construction by the Commission—the tribunal to which the application of Section 2 was entrusted and which would be solicitous to enforce it—that it applies to cars with roofs [fol. 890] and not to tenders, they having no roofs. While the view of the Commission is not conclusive with us, it is probably persuasive. We agree with it."

Now, practical construction is one of the most important methods of interpreting statutes, but it is not confined to statutes. The court, in the Pocket Veto Case, have used practical construction as a guide for interpreting the constitu-ion. They have used it as a guide for interpreting statutes. They have used it as a guide for interpreting con-

tracts, written documents, and the Commission has used it and the courts have sustained the Commission in using it in the interpretation of tariffs.

Now, I say that in this particular case, the practical construction of the Act which is not unambiguous at these other yards, and the facts surrounding those, should be received by the Examiner so that we may argue that point before the Commission, and we cannot argue it unless we are allowed to put in the evidence, and as the court said, it is not only the affirmative acts of the Commission which show practical construction, but it is these other acts which show the failure or non-action on the part of the Commission.

Now, with the Bureau of Inquiry on the job at Washington——

Exam. Carter: On the job at Washington today.

Mr. Gladson: And on the job at Chicago, and with the Commission solicitous, as was said by the Supreme Court [fol. 891] to enforce the Act, the failure of the Commission to enforce the Act at Sioux City automatically as a practical construction of that Act, convinces me and to my way of thinking it is wholly improper for the Examiner to refuse us the opportunity to present these facts to the Commission.

Now, I do not intend at this time to argue the question of the offer of proof, because I take it that later on, if the ruling of the Examiner is adverse here, we will have an opportunity to argue that particular phase of it at that time.

My colleague, Mr. Fulbright, is going to argue the other point involved, and with that thought I will say to the Examiner that I think it is wholly improper for the Examiner to exclude this evidence and not allow us to prove it, having in mind particularly that if the Commission thinks it incompetent, immaterial and irrelevant and not proper evidence in this case, the Commission can disregard it.

Argument by Mr. Fulbright

Mr. Fulbright: Mr. Examiner, I shall address myself just a little farther to the general proposition in this case that the evidence offered and sought to be introduced in a legal proceeding does not depend upon the conclusiveness of that evidence in establishing a fact. If the evidence offered has a legitimate tendency to establish a controverted fact and its fairness is unquestioned, that evidence is certainly relevant and should be admissible in a proceeding which is

[fol. 892] undertaken to determine that fact. Thus it appears that evidence as to analogous situations to the case at hand has a relevant and material bearing upon the determination of the administrative practice in regard to the situation under review, and such evidence should be admitted by an administrative body searching for a factual basis upon which to ground its order.

Before going into that, however, I shall merely refer to the fact that the petition for rehearing in this case states a number of different grounds. Several days prior to the time this was filed, the respondent had resorted to the courts. Now, the action of the Commission in denying the petition is no ground whatever, but I know if I had been on the Commission and the respondents in question had all gone to the courts, I would say, "All right, they have gone to the courts. Let them carry it out. We will deal with it no longer. It is in the lap of the courts."

I just mention that to show that decisions which deny petitions for rehearing and deny writs of certiorari do not preclude the re-submission of a petition for rehearing at some later date and they do not pass upon the admissibility of any evidence that may have been proper. That is the universal rule.

Also, it has been said here by counsel that the Commission in this particular case in the prior hearing has ruled that the character of evidence here submitted is not admissible.

[fol. 893] There was some discussion in the case, in the record already made. That discussion arose in connection with a statement by a witness that out of 136 stock yards only one was required to file loading and unloading tariffs with the Interstate Commerce Commission, and it was stated that that would be covered more in detail by further witnesses, and finally it was admitted that this witness who was on the stand was incompetent to testify to that, and at the suggestion of Chairman Splawn the statement was withdrawn. That was done, as shown at page 69.

Now what did happen in connection with it was that arguing the general question, counsel then speaking for respondent undertook in some detail to show what they were going to show by another witness. Counsel for the protestants objected that that was not a proper offer in proof and Commissioner Splawn at page 83 of the record in this proceeding ruled that it was not a proper offer of proof and sustained that objection. That is the only objec-

tion that was ruled upon in connection with the discussion.

There was some discussion between Commissioner Splawn and counsel as to the application of the doctrine of contemporaneous interpretation, the Commission taking the position that where it was with reference to a decided case that they should not here undertake to go in and retry that case, with which counsel for the respondent agreed, but there [fol. 894] never was a ruling made as to the admissibility of this particular type of evidence.

Now, I wish to refer just briefly to this doctrine of contemporaneous or administrative practice. There is not any doctrine more firmly established today than the doctrine that where an administrative officer, be he an executive officer or a commissioner, like the Interstate Commerce Commission, has followed a certain line of practice, that the practice with respect to that point is admissible in evidence on the question of whether or not it is a proper interpretation of the statute, or whether or not the acts in question are the law.

Now, it is stated in the Act that common carriers by railroad, transporting passengers and freight by railroad, are subject to the Act, but there is no definition as to what in itself is a common carrier under the Act. That being true, it is rather important to see with reference to this type of an operation what the administrative construction has been upon it, and the Commission has always followed the practice of permitting evidence in a rather broad way as to analogous situations, as I stated at the outset of my argument.

In one of the old cases, in the Associated Jobbers of Los Angeles v. The Atchison, Topeka & Santa Fe Railway Company, 18 I. C. C. 310, there was a question tried before the Commission as to whether a charge for spur track delivery in the city of Los Angeles was legal. In determining this [fol. 895] question, the complainant there, the Associated Jobbers of Los Angeles, offered testimony as to the practice at 97 destinations in California, involving a practice similar to that existing in that particular proceeding. And also at Portland, Seattle, Tacoma, and other points outside of California, and the Commission in its decision at page 314 reviewed the practice at the other points and stated that:

"There are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points."

And, it points out that at these points as well as Tacoma, Seattle, and a large number of other points, these lines impose no charge for the spur track delivery, otherwise on team track. That case was reviewed by the Supreme Court, and the Supreme Court in its decision, which confirms the decision of the Interstate Commerce Commission, and was rendered in 234 U. S. 294, specifically recited that the Commission in its investigation had found that at all of these points in California and elsewhere they did not follow the practice of making a charge for the team track delivery, and quoted with approval its finding to that effect.

Now, then, in the Star Grain & Lumber Company v. A. T. & S. F. Railway Company, 14 I. C. C. 364, there was another similar case which went to the Supreme Court for its determination. In that case some retail lumber dealers in the [fol. 896] southwest, whose yards were located at local points on the lines of the Santa Fe, filed complaint to secure the restoration of through routes and joint rates on yellow-pine lumber to those local points from mills in Arkansas, Louisiana, Missouri and Texas. The real controversy involved in the proceeding was as to the division of the through rates when re-established, as between the Cotton Belt and Santa Fe, and this necessitated the decision by the Commission as to the status of certain lines called tap lines. Now, mind you, there were certain specific lines under review in that case, and in that case the Commission proceeded to make a review of all of the tap lines and made the finding set forth in its report in 17 I. C. C., 342. In that report, at pages 342, 343, among other things the Commission said:

"In the investigation made by the Commission on its own initiative in aid of this record and other matters pending before us, the facts in relation to some 740 tap lines in various parts of the country were gathered, either through responses made to our inquiries in the form of circular letters and otherwise, or through personal examinations made in the field by our examiners. The information thus acquired may be assumed to be generally accurate."

Now, mind you, that was made on the Commission's own motion, and it grew out of the fact that in the original case there were certain lines involved and they were undertaking [fol. 897] to decide what the practice was and what the

status was, and which were reported as common carriers, and there is a summary made here. For instance, it says:

"It shows that of the 740 tap lines so investigated 183 have gone through the form of being incorporated as railroads; but 65 file with this Commission tariffs applicable to interstate movements; only 50 tap lines concur in the interstate tariffs of regular carriers; 621 tap lines neither file tariffs of their own nor concur in the tariffs of other lines covering interstate shipments; and but 92 file annual reports with the Commission as required by law by common carriers engaged in interstate commerce."

Now, mind you, the Commission there was undertaking to get the legal status of the companies under review in that case, and that decision was also confirmed by the Supreme Court of the United States.

We could cite numerous cases of the Commission where they have reviewed these situations. I do not think there is any line of cases that is more closely in point than those in which the Commission has reviewed the rate and tariff situation in New York harbor. That New York harbor situation has been before the Commission in three or four different cases.

In the New York Harbor case, 47 I. C. C. at 643, there was involved the practice of lighterage, and the question as to whether or not that lighterage cost should be taken into [fol. 898] consideration in fixing the rates to New York as contrasted with other ports; and in its decision the Commission says:

"The defendants show that it is by no means unusual to recognize the additional cost of specific terminal services in constructing rates for short distances."

Then it states: "The rates from points in southern New Jersey to Camden, for example, are lower than the rates from the same points to Philadelphia; and the rates from points in Pennsylvania within a relatively short distance of Philadelphia are lower to that point than the rates to Camden; yet the rates from points in the west to Camden in practically all instances are the same as the rates to Philadelphia. Similarly, the rates from points a short distance west of St. Louis, Missouri, are lower than the rates to East St. Louis, Illinois; yet on long distance traffic these points almost invariably take the same rate."

"It is by no means unusual, as the present records show, for carriers to absorb switching charges when the freight revenue is sufficient to warrant it, and the absorption tariffs usually state the minimum revenue per car which the carrier prescribes in such cases. Transit is frequently accorded without any charge in addition to the through rate when the revenue is sufficient to justify it."

In addition, at page 713, in its opinion, the Commission discussed the justification of the practice of applying a [fol. 899] common rate to all parts of the port of New York, as proof of which evidence had been introduced that there were many instances at other points in which the additional cost of transporting freight across the river or bay was disregarded in constructing rates. The Commission discussed the Philadelphia-Camden situation, the Pittsburgh-Allegheny situation, the Galveston Port Boliver situation and several other situations and, while finding dissimilarities, pointed out that the comparisons were by no means valueless.

The Commission then discussed the San Francisco Bay situation, concerning which a considerable amount of evidence had been placed in the record to illustrate practices of the rail carriers there disregarding the cost of transporting freight across the bay.

In other words, by an analogy putting those situations up alongside of the situation under consideration, in order to determine what had been the administrative practice and what had been the practice of the railroads.

Now, the lighterage case is only two or three years ago, and there were two primary issues in that case. One was the question as to whether or not the charges for lighterage across New York Harbor should be published in the tariffs; whether or not the carriers themselves or the Lighterage Company, or both of them, should file tariffs embodying these charges, with the Interstate Commerce Commission. [fol. 900] The lighterage, as was pointed out in that case, was performed by contract lighters of three certain lines who had their own lighters, but often they employed contract lighters, and the other main issue in the case was the question of whether it was legal to throw the New Jersey port, which did not involve this expensive lighterage and transfer service in with the Brooklyn and Manhattan Island ports. There, in connection with that, as referred to in this

decision, was considered the practice at many ports. I happen to be familiar with that record and the witness who testified on that was Mr. Charles E. Bell, who testified as to the situations at various ports and various inland ports. That situation was reviewed in some detail in the lighterage cases.

Now, also, I call attention to the fact that in that case in dealing with this lighterage, the Commission says, on page 511:

"In prior cases we have considered lighterage and car floatage as a necessary part of the transportation included in the freight rates."

Now, that involves review of decisions in prior cases which were reviewed in the record and discussed here.

It then cites 35 I. C. C. 47, with regard to Lighterage and Storage Regulations at New York.

Then the Commission goes on to say:

"Section 1 (3) of the Interstate Commerce Act has spe-
[fol. 901] cifically provided since the amendment of 1920 that the term 'railroad' as used therein 'shall include all * * * lighters * * * used by or operated in connection with any railroad', and that the term 'transportation' as used therein, 'shall include * * * vessels and all instrumentalities and facilities of shipment or carriage.'"

And therefore they find "that lighterage and car floatage in New York are equivalent to necessary extensions of the rail lines of the various railroads."

In view of these cases they cite and the provisions of Section 1, paragraph 3, of the Act, it is manifest that Section 6 of the Act requires charges to be stated separately, and they do not require the Lighterage Company nor the railroads themselves to publish them, even though that was one of the primary contentions made in the case, was the fundamental contention in fact, and even though the practice at the other ports was developed.

Now, then, there was testimony that lighterage at New York is not absolutely necessary as a part of the transportation. It is just as necessary to get these cattle out of that car where they can be taken charge of, as any part of the transportation.

Mind you, there was a very strong dissenting opinion by four or five of the Commission, the dissenting opinion dealing with the question of lighterage, and holding that the [fol. 902] lighterage line should not file the tariff but that the railroad that engaged to extend its point of delivery over to Manhattan or Brooklyn should file the tariff.

The point is that in that case, and I don't think any witness offered anything in that case that somebody did not object to it, the Commission did go into the discussion of analogous situations, and they got into many many cases where the Commission has required that those performing the service which was a part of the transportation were required to file tariffs, and in so doing has considered the situation applicable at various points.

Now, I want to refer to this expression of the United States Supreme Court with respect to a case that came up from the Interstate Commerce Commission. It says:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, whereas a strict correspondence is required between allegation and proof."

That quotation is from the leading case of I. C. C. v. Baird, 194 U. S., at page 44.

Another expression from the Supreme Court, 271 U. S. [fol. 903] 268, the case of Western Paper Makers Chemical Company, where, in upholding the power of the Interstate Commerce Commission to establish certain rates, Mr. Justice Brandeis said, at page 271:

"In making its determination, the Commission is not hampered by mechanical rules governing the weight or effect of evidence. The mere admission of matter which, under the rules of evidence applicable to judicial proceedings would be deemed incompetent, does not invalidate its order."

And in U. S. v. I. C. C., 51 F. (2d), 429, a mandamus proceeding, where they undertook to mandamus the Commission, the Court of Appeals of the District of Columbia, said:

"It may be conceded that the procedure pursued before the Commission in this case does not conform to the rules

adopted by courts of law. However, the Commission is an administrative body and its proceedings under Sections 13 and 16 of the Interstate Commerce Act are administrative and not judicial in character. The Commission therefore is not hampered in such proceedings by the hard and fast rules as to pleading and practice which prevail in courts of law. Moreover, it is provided by the Interstate Commerce Act, Section 13, that in such cases, 'it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.' And in Section 17 of the Act, it is enacted that 'the Commission may conduct its proceedings in such manner as [fol. 904] will best conduce to the proper dispatch of business and to the ends of justice.' ''

And I want to refer to another matter in that connection; I think the Commission very properly expressed the importance in all of these decisions of considering analogous situations to determine the general practice, not only with respect to how it may have handled the situation, but with respect to how the railroads themselves may have handled the situation.

Exam. Carter: Let me ask you, could not the failure to act in respect of Sioux City be a failure of duty as well as of contemporaneous interpretation?

Mr. Fulbright: If we were only going to deal with Sioux City alone I believe I might say we would have some ground for saying that would be the situation, but we must connect that up with the thought that we propose to show that there are similar situations relative to that at various other public markets where the information has been before the Commission, and in the case we had of the Kansas City Stock Yards there was a decision by the Commission and it was reviewed in the minority report. Now, we contend that we certainly have a good ground for showing the administrative practice.

Now, mind you, what you would say would not go to the admissibility so much as to the weight of it, if we only made one swallow we would not make a summer.

Now, on the 23rd of April of this year, since the prior [fol. 905] hearing in this case, the Commission addressed an official communication to the Senate Committee on Agriculture and Forestry with respect to a measure which had been introduced in the Senate by Senator McGill, "to amend the Packers and Stock Yards Act, 1921, as amended".

I am not going to read this in evidence, Mr. Smith.

Exam. Carter: Was that a communication from the Commission or from the Legislative Committee of the Commission?

Mr. Fulbright: It is addressed to Honorable E. D. Smith, Chairman, Committee on Agriculture and Forestry, United States Senate.

Exam. Carter: I don't know, I was just asking.

Mr. Fulbright: It says:

"The Chairman of the Commission has referred to our Legislative Committee your communication of April 14, 1937, requesting a report on S. 2129, introduced by Senator McGill, "To amend the Packers and Stock Yards Act, 1921, as amended". The Bill has had the careful consideration of the Legislative Committee, and I am authorized to submit the following comments in its behalf:"

Now, I knew it was written by the Legislative Committee addressed to Honorable E. D. Smith, Chairman, Committee on Agriculture and Forestry, of the Senate, and it is signed by Joseph B. Eastman, Chairman, Legislative Committee.

Now, we are not trying to put this in evidence as an [fol. 906] exhibit, but I admit that is the customary practice.

Now, the discussion involved the question of the jurisdiction of the Secretary of Agriculture over the loading and unloading, and a later reference to the prior decision in this situation here, in I. & S. 4109, and to the fact that the company has initiated another attempt to cancel all of its tariffs from the Commission's files and says the question is again pending before the Commission through the suspension of this attempted cancelation in I. & S. Docket No. 4296.

Now, I want to call your attention to this language contained therein:

"Except for the Union Stock Yards & Transit Company, no tariffs have been filed with the Commission by stockyards companies showing charges for loading and unloading live stock in connection with railroad shipments, although a very large number of such companies, in addition to the one at Chicago, perform such service for the railroads."

He then goes into the discussion of the Supreme Court decision in 226 U. S.

Mr. Smith: I move to strike those references from the record.

Mr. Fulbright: This is not in evidence. You do not object to my statement, do you?

Mr. Smith: I move to strike those references from the record, those documents from which counsel is reading, and [fol. 907] which he protests he has not attempted to put in evidence.

Mr. Fulbright: Mr. Examiner, I am merely making the point here as to whether this evidence is admissible. I am not——

Exam. Carter: Your objection will be noted in the record.

Mr. Fulbright: All right.

"As will be seen from the above, a large number of public stock yards are now performing loading and unloading services and charging the railroads therefor without the present exercise by the Commission of any jurisdiction over such charges."

Now, I merely bring that up, Mr. Examiner, to show it simply follows what the Commission, in all of my nearly thirty years of practice before it has followed, as an administrative body, in determining either a question of jurisdiction, the legality of a tariff, the propriety of a rate adjustment, the question of establishing tariffs, that the Commission in all such cases rightly does go into the consideration of analogous situations, and further prepare it, not only for the purpose of determining what has been the practice of the Commission, the practical construction of a statute, but what has been the practice of the carriers who publish the tariffs and who apply them.

I have mentioned that particularly because the line of evidence on the tariffs, Mr. Examiner, was introduced particularly to show the practices of the respondent, that they [fol. 908] do not treat the other yards and facilities any different from the way they treat and consider the one at Chicago, so that on either line there can be no question, it seems to me, but what the purpose of, I should say, the administrative construction, the construction by the parties engaged in the administration of the transportation, is permissible, and certainly we can say the Commission has not definitely ruled on this question. This particular argument was just presented to the Commission in this proceeding. It was just a mere general statement thrown in in a motion for reconsideration of the appeal to the Examiner to follow what has been certainly the unbroken line of

practice of the Commission, which has the full approval of the courts, and give these parties an opportunity to show what they conceive to be the matters that will have weight before the Commission.

Now, it may be some of it does not have much weight, but after all, the question to be determined is whether or not the evidence has a legitimate tendency to establish a controversial fact; it may have little weight, it may be inconclusive, but if it has a legitmate tendency, to establish a certain fact, then it is admissible.

Exam. Carter: Will you give me that Senate Bill number, please. I have been intending to get that for some time.

Mr. Fulbright: Senate Bill 2129, introduced by Senator McGill.

[fol. 909] Mr. Walter: Mr. Examiner, I think I might very properly supplement what Mr. Fulbright said about the tap line cases by calling attention to this, that there were 103 of them examined in that one case. In one of them, on the Louisiana and Pine Bluff, I made the contention that the distance traveled to and from the scales was properly to be included in figuring the distance for which compensation should be paid, and I tell you there was absolutely no evidence in that record upon which the Commission could determine the compensation, and I took that case to the Supreme Court and the Supreme Court said that the Commission had the right in investigating such questions to make a full and complete investigation and to reach a conclusion, and upon that they dismissed my bill, leaving the Commission unhampered in getting all information, rather than restricted information on a mixed question of law and fact.

I intervened in this case because of the situation brought up by the complaint filed by the railroads having to do with what they will pay for their loading and unloading of live stock. Four carriers brought that complaint.

I have taken the position right along that in reaching a conclusion on a mixed question of law and fact, that the railroads whether or not technically they be common carriers or not common carriers, and whether required to be in the tariff or not when the railroad publishes the rate through, under this statute, whether the stock yards is a [fol. 910] common carrier or not, the question is ought it to have a tariff on file.

Now, what is the practice at every other yard, it seems to me, should be gone into, and I want to preserve my right to have that situation developed in the St. Louis National Stock Yards case which I have asked the Commission to set down for hearing shortly, so that that record will be made complete, whether it gets into this case or not.

Exam. Carter: We will recess until 2 o'clock.

Mr. Fulbright: Mr. Examiner, I just want to add that I neglected to call attention to the language of Section 6 where it says the Commission may require that tariffs be filed covering certain services, so that it shows it becomes a discretionary matter, and therefore it becomes all the more important to consider the practice that has been followed.

Exam. Carter: We will recess until 2 o'clock P. M.

(Whereupon, at 12:30 P. M. adjourned until 2 P. M.)

[fol. 911] Afternoon Session 2 P. M.

Exam. Carter: Come to order, gentlemen.

C. B. Heinemann, previously sworn, resumed the stand.

Direct examination (continued):

Exam. Carter: It is my understanding that I now have before me the question of the admissibility of—I mean, I now have before me this tender of proof relating to the situation at Sioux City, is that right?

Mr. Gladson: Mr. Examiner, I thought that I had made the record clear on that subject.

I want to make an offer of proof, and, as part of the proof I asked that certain exhibits be marked for identification. The Examiner refused to allow me to mark them for identification and also refused to permit me to make an offer of proof by question and answer method but said that I might make a statement about these exhibits and about the character of the proof. I did not intend that statement or those references as an offer of proof but merely by way of explanation so that we might argue this question, the general question of admissibility.

Now, I still think the Examiner is wrong and I preserve an exception, if he is not going to let me make an offer of proof here. I think there is error and I intend so to contend.

Exam. Carter: Well, I rule that the evidence referred to is inadmissible.

[fol. 912] Mr. Gladson: Very well.

Mr. Fulbright: May I ask, Mr. Examiner, if the ruling just made is also made with respect to the portions of Exhibit 24 which were identified and described on the record this morning, with respect to other markets than Chicago?

Exam. Carter: Yes, my ruling goes to that and I grant Mr. Smith's motion to strike from the record all matters or all testimony given in connection with Mr. Heinemann's description, I mean, testimony, this morning, which does not go to the identification of the page numbers of Exhibit 24.

Mr. Fulbright: It will be understood, of course, that we have an exception to that ruling.

Exam. Carter: Yes, sir.

Mr. Gladson: And, Mr. Examiner, do I correctly understand you that your ruling is that you won't permit any evidence concerning facts and circumstances at these other stock yards; these other posted stock yards?

Exam. Carter: Yes, sir.

Mr. Gladson: And am I correct, also, in my understanding, that you won't permit us to mark any exhibits pertaining to these other yards for identification?

Exam. Carter: That is correct.

Mr. Gladson: Or that I won't be permitted to put questions to this witness concerning the facts and circumstances of these other yards and offer specific proof concerning such facts?

[fol. 913] Exam. Carter: That is true.

Mr. Gladson: Now, to each of these rulings, Mr. Examiner, I want to take an exception.

Exam. Carter: Those exceptions will be noted.

Mr. Gladson: Now, incidentally, Mr. Examiner, on this question of offer of proof, I have a short memorandum that before the door is finally closed upon that, I would like to be heard upon. I wont take long, but the ruling of the Examiner appears to be so far reaching and so far from anything that I have ever experienced in any Court or before any administrative body, that I would feel remiss in my duty if I did not present the matter a little further to the Examiner.

Exam. Carter: You may make the statement, Mr. Gladson.

Mr. Gladson: I might say in this connection that the subject, the question, the right to make an offer of proof is so elementary that I have not prepared any elaborate memorandum of authority, but I largely rely upon what is stated in Corpus Juris.

Now, as to the right to make an offer of proof, this is what Corpus Juris says: "The requirement that an offer of proof be made is not only for the purpose, first of advising the Trial Court so that it may rule advisedly but it also necessary in order to preserve an exception to the exclusion of offered evidence, and so that the Appellate Court may know whether the answer excluded would have been favorable to the party offering it and therefore justify a reversal and a new trial.

[fol. 914] Where an offer of proof is necessary, it is error for the Trial Court to refuse an opportunity to counsel to state what he proposed to prove by the evidence offered."

Now, in this particular case, the commission, in the first instance, won't know the evidence that we offered, which Your Honor excluded, unless we are allowed to mark our exhibits and make our specific offer of proof, and if the matter gets into court; the court won't know what we offered to prove, by way of specific evidence, unless we are allowed to mark exhibits and to offer specific proof.

Now, that seems to me to be elementary, and it has always been treated so. The lowest court that we have in the City of Chicago is the Municipal Court, and there never was any question, even in the Municipal Court, as to the right to make an offer of proof.

Now, as to the character of this proof, whether it should be general or specific, I again quote from Corpus Juris:

"An offer of proof must be certain, intelligible, must definitely state the facts sought to be proved," and so forth.

"An offer must be specific enough to make its relevancy apparent."

Again: "The offer cannot be made in general terms, but must be so made as to give the court an opportunity to rule on the specific testimony complained of, the exclusion of which is made and must be so specific as to show the error of the court in refusing to admit it."

[fol. 915] Now, I am talking about, in the first instance, the commission, when they come to pass on your ruling

and, the second instance, if we get into the court, what the courts are going to say about it.

Again: "It is not sufficient that the offer state the ultimate fact in language appropriate to a pleading, the evidentiary facts must be set out."

Again: "The offer must be of facts and not of conclusions."

The Supreme Court of the United States, in the case of Central Pacific Railroad against California, 162-91, said at Page 117:

"Offers of proof must be offers of relevant proof, specific; not so broad as to embrace irrelevant and immaterial matter, and made in good faith."

Now, I concede that the refusal of the Examiner to let us mark exhibits which we may offer in evidence, or to let us ask specific questions of this witness, or offer to prove specific facts on the question of offer of proof, is error and is reversible matter—is reversible error.

Mr. Smith: I will say just a word about that: If counsel believed that the ruling of the Examiner would be overturned by the commission or by the courts with reference to this offer to prove, they would not be much concerned about it. The reason that they are concerned about it is [fol. 916] that they know that the ruling of the Examiner is right, because the record shows here, with complete clarity, exactly what it is that these people are seeking to do.

Mr. Walter: But how, Mr. Smith, are you going to identify a particular exhibit as being the one that was offered? All that has been done so far was merely to read a caption on it. Now, certainly the record ought to identify an exhibit so that it cannot be gainsaid that this is the one that was offered. I am merely speaking now that the idea of getting it into the record is going to save the time of everybody. What harm can there be to mark the exhibit? It is not accepted but it is merely identified. I don't understand there will be any prejudice to anybody.

Mr. Carter: If you want me to give marks to the exhibits that you may more readily refer to those exhibits, I will give certain marks but I will not continue the marks in the succession of the exhibits which are received in evidence in this case. If you want to do that, I will do that, for your convenience.

Mr. Walter: I understood that that is what the Examiner had suggested, I mean the counsel, but I felt that the Examiner was putting himself in a position where he could hardly justify declining to identity an exhibit offered, no matter whether you put a picture of the counsel on it, or something that you cannot get away from it that this is what is offered and what was excluded. Just from the prac- [fol. 917] tice standpoint, it seems to me that is absolutely essential to the protection of everybody.

Mr. Gladson: I want, Mr. Examiner, to have the exhibits identified with particularity. I want to have an opportunity to offer them in evidence for the ruling of the Examiner on the offer, and then I also want to be able to show specifically what the witness would testify to if he were permitted to testify. Now, I cannot concede that an offer of proof that is adequate enables me to protect my rights unless I am given an opportunity——

Examiner Carter: I will adhere to my ruling, but if you parties want, for your own convenience, to have these exhibits which you are offering marked, I will allow them to be marked starting with Number A.

Mr. Gladson: Well, Mr. Examiner, is it understood that even after we get them marked we won't be given an opportunity to offer them in evidence?

Exam. Carter: I think that I have already ruled on that, but if you want me to rule specifically, I think I will do it. I rule on it on the ground that the testimony is irrelevant and immaterial; that this issue here is whether or not the Union Stock Yard and Transit Company of Chicago is a common carrier subject to the act; that no matter what the conditions at other stock yards may be, those conditions cannot have any bearing upon or any effect upon the commission's determination of the status of the Union Stock Yard and Transit Company.

Mr. Gladson: Mr. Examiner, I do not feel disposed to [fol. 918] accept the ruling of the Examiner as final in this case. I am suggesting at this time that the hearing be postponed to give the respondent an opportunity to take up with the full commission the question of the admissibility of this particular evidence, in a motion to the full commission, so that the commission may have the facts before them.

Now, in connection with that offer, in order that no one may be prejudiced by the delay that it will entail, I will say that the Stock Yard Company will voluntarily postpone

the effective date of its cancellation schedules and I take it that probably Mr. Walter here can speak for the Great Western in connection with the joint tariff schedule.

Mr. Fulbright: Docket 4244.

Exam. Carter: Mr. Walter has already spoken about that.

Mr. Walter: Yes, I said we would extend it until the commission is ready to decide it.

Mr. Smith: We object, if you please, to any postponement of this proceedings. We ask that we proceed here to complete this hearing and to close this record. There could not be any possible theory upon which the record should be kept open except upon the assumption that the commission was going to overrule the Examiner and accept this evidence, and I think that it has been clearly indicated by the commission that it is not going to accept this evidence, and there is every reason for closing the record, and if an excep-
[fol. 919] tion is preserved on this point it can be argued then, when the matter is submitted, and it would only be then, in the event that the commission did overrule the Examiner, that it would be necessary to have a further hearing in connection with this matter.

Mr. Fulbright: Mr. Examiner, I did not understand that the Examiner had indicated that he had any instructions from the commission about the admissibility of this evidence at all.

Mr. Smith: Read back what I said, please.

Mr. Fulbright: I implied that from what you said.

(Mr. Smith's remarks read by the reporter.)

Mr. Smith: I don't understand that there is any such implication there.

Mr. Fulbright: Except the statement that the commission has already indicated that it would not accept this evidence.

Mr. Smith: I think they did when they denied your petition for rehearing.

Mr. Fulbright: That wasn't this evidence, in the first place, and, in the second place, Mr. Examiner, the protestants here cannot possibly be damaged by it. They are desirous of continuing the tariff as it now is; they have made no choice whatever as to how they would be damaged or prejudiced by it.

Now, we are just as sincere in our feeling that this evidence of administrative construction is important, that we

want it passed upon by the commission; we want an opportunity to put it before the commission to say whether or [fol. 920] not it is material and, obviously, we cannot do it under the rulings as they have now been made. That is the reason I feel that there is justice in our request that we adjourn for a further hearing, pending which we will undertake immediately to place the evidence before the commission with an appeal from the rulings of the Examiner.

Now, we wish to make a complete record. This is the second attempt we have had at it. My reading of the former record gave me the impression that it was a very incomplete record. We sincerely do not want to have to make another attempt and we think it but reasonable that the case be held open until we can determine whether or not the commission will permit us to put in this evidence, a part of which, only, has been identified here, but which will cover various other yards, and the testimony in connection with them by this witness, whose qualifications have not been questioned.

Exam. Carter: Gentlemen, we will continue with this hearing. Of course, your appeal from the Examiner's ruling, that does not affect that at all in any way, but we will continue with the hearing and close the hearing at this session; I mean, at this particular session, at this time.

Mr. Gladson: Mr. Examiner, would you listen to a motion? If Mr. Smith wants to cross-examine Mr. Heinemann as to these features of the case while the facts are fresh in his memory, would you listen to a motion that, after he has finished cross-examining Mr. Heinemann, the case be left [fol. 921] open for our appeal to the commission from the ruling of the Examiner.

Exam. Carter: You mean and you not complete the record?

Mr. Gladson: The only thing would be left——

Mr. Fulbright: The only thing would be left would be to get this in.

Mr. Gladson: To get this in.

Exam. Carter: I think you had better proceed with your testimony and close the record at this session.

Mr. Gladson: Is that the——

Exam. Carter: That is the ruling.

Mr. Gladson: Well, may I except to both rulings of the Examiner?

Exam. Carter: Yes, note the exception.

Mr. Walter: Off the record.

(Discussion outside the record.)

Mr. Fulbright: I want to make a statement on the record. Is this on the record?

Exam. Carter: Yes.

Mr. Fulbright: Mr. Examiner, Mr. A. Z. Baker, who appeared here for the American Stock Yards Association, Eastern Division, requested me to state that he was unexpectedly called back to Cleveland last night and could not attend the remaining portion of the hearing. He filed an appearance for that organization, which represents the public stock yards east of the Mississippi other than the Union Stock Yards at Chicago and the National at East St. [fol. 922] Louis, Illinois, and he will, in his brief, state the position of his organization, which will be filled herein.

Mr. Gladson: Before I make my formal offer of proof, Mr. Examiner, or attempt to go into specific details, there are two or three further questions about another matter that I would like to ask Mr. Heinemann.

Exam. Carter: Very well.

By Mr. Gladson:

Q. Mr. Heinemann, in connection with the collection of charges for the railroad companies by respondent, do you know whether or not a bond is given by the Respondent Company to the railroads to protect and indemnify the railroads against loss of money collected and not remitted by the Stock Yards Company?

A. That bond was given, yes, sir, Mr. Gladson, following the establishment of the joint or district agency there at the Yards.

Q. Can you tell us a little more in detail the method of billing and collecting charges and remitting these charges to the railroads and from the railroads to the Stock Yards Company?

A. Well, Mr. Gladson, as I have indicated in my earlier testimony, the amount to be collected is based upon the computations made by the railroad agency or by the Western Weighing and Inspection Bureau, or by both agencies in conjunction.

Having indicated to the Stock Yards Company, as the agency for that collection, the amount to be collected, the collection is made by employees of the Stock Yards Company.

[fol. 923] Now, unlike the ordinary station interline account, the amount collected, after collection, is not divided by the Stock Yard Company, between itself and the district agency lines but the entire amount collected is—that is, the entire amount of freight charges collected is remitted by the collecting agency to the district agency of the railroads. That differs from the ordinary interline station account settlement, in that if it were handled in that manner, we would retain, of course, our proportion and remit the balance back to the next line in succession.

In the settlement of these charges, as I have explained, those remittances go back twice each week. In rendering our bills for the loading and unloading of live stock, those bills are rendered monthly against the district agency as representing the line haul carriers.

That bill goes to them on a form which lists the various railroads having had the services performed and the amount owed by these particular railroads and the bill is supported by our combination multigraphed and printed form showing the number of cars received by each of those respective lines, so that the district agency may know the basis for our bill and, by checking against their records may ascertain its correctness, and pay it accordingly. That bill is rendered monthly, as is usually the case on operating accounts of that kind, and that bill, ordinarily, is paid promptly by the district agency as soon as it can be verified.

[fol. 924] Mr. Gladson: Now, Mr. Examiner, the other day I offered to prove by the oral testimony of this witness, the position of the government in the Stock Yards Valuation Case in respect to the $3.00 charge against the railroads, concerning which we have heard too much in this case. As I recall the ruling of the Examiner, our offer was rejected because it was not the best evidence. I will ask Mr. Heinemann, whether or not he has had prepared an excerpt from one of the exhibits of the government in the valuation case, before the Secretary of Agriculture, which showed the position of the government in respect to the $3.00 charge.

Exam. Carter: Now, you put that: "The position of the government." You mean that that is the way that the auditor for the Secretary of Agriculture has set that account up; is that what you mean?

Mr. Gladson: That is right.

Exam. Carter: I mean, when you say; "The position of the government," you do not mean that the government has taken any specific position except that its auditor has set up on this statement that $3.00 charge in a certain account; is that correct?

Mr. Gladson: Well, I think it is probably a little broader than that.

By Mr. Gladson:

Q. This is an excerpt from what exhibit, Mr. Heinemann?

A. Government's Exhibit No. 30.

[fol. 925] Q. Officially known in the record in this proceedings as Government's Exhibit——

Exam. Carter: Well, I mean that proceeding has not gone beyond hearing?

Mr. Gladson: No, that proceeding has not—the ultimate decision has not been made.

Exam. Carter: And has the hearing been closed?

Mr. Gladson: The hearing has been closed and the abstract of the—the record is now being abstracted.

May I have this marked as Respondent's Exhibit 27.

(Respondent's Exhibit 27, Witness Heinemann, identified.)

Exam. Carter: When you refer to the government, you refer to the Department of Agriculture?

Mr. Gladson: That is right.

Mr. Smith: You are going to insist that a great deal that they put in there does not, in fact, could not, properly, represent the government; are you not?

Mr. Gladson: That is a matter that will be disposed of at the proper time and in the proper record.

Mr. Smith: The answer to the question here is yes, that that is your position?

Mr. Gladson: I am not making any answer.

Mr. Smith: I take the same position here with reference to this exhibit that you are going to take, I assume, and I think that you will not deny, with reference to most of the exhibits which the government put into that case, and I move [fol. 926] that it be not admitted.

Mr. Gladson: It has not been offered yet.

By Mr. Gladson:

Q. Mr. Heinemann, I show you the document which has been marked Respondent's Exhibit No. 27, for identification, and ask you what it is?

A. That, Mr. Gladson, is Sheet No. 1 of Government's Exhibit No. 30 introduced by Witness H. E. Buffkin, the auditor in charge of the auditing of accounts of the Union Stock Yard and Transit Company, Docket No. 472, of the case instituted by the Secretary of Agriculture, at the time of the suspension of one of their tariffs.

By Exam. Carter:

Q. As I understand it, the so-called $3.00 charge published in the Packers and Stock Yard Act——

A. Tariff.

Q. I mean tariff is included in one of these items; is that right?

A. Yes, sir.

Mr. Gladson: The thing I am trying to prove by this exhibit, Mr. Examiner——

Exam. Carter: Now, let me ask him just one other question and see if he knows.

Mr. Gladson: All right.

By Exam. Carter:

Q. That is included in what amount on this exhibit?

A. In the amount shown in the first column, the aggregate sum being, $337,300—it is rather dim there—$368.00.

[fol. 927] Q. Do you know whether or not that is simply so far as it represents that $3.00 charge, an amount which appears on the books of the Union Stock Yard and Transit Company?

A. That is not the amount, with this difference, that Mr. Buffkin, as this computation shows, deducted from our posted amount, that amount on the number of cars of government animals which were handled during that period. That is set out in that explanatory type there.

Q. Then it is your understanding that it does represent the $3.00 charge occurring on your books against shipments of live stock, except those made by the government or to the government; is that right?

A. That is true.

Mr. Gladson: I will offer Respondent's Exhibit No. 27.

Mr. Smith: Objected to as immaterial.

Exam. Carter: I will admit it for what it is worth.

(Respondent's Exhibit No. 27, Witness Heinemann, received in evidence.)

Mr. Gladson: I wonder, Mr. Examiner, if we may go off the record a minute.

Exam. Carter: Well, we will recess for five minutes.

(Whereupon, a short recess was then taken.)

Exam. Carter: I don't want you gentlemen to misunderstand my ruling with respect to the permission granted to give some sort of designation to exhibits, for instance, similar to these Sioux City exhibits. As I stated, that is [fol. 928] made solely for the convenience of Respondent's Counsel in referring to those particular papers in any subsequent proceedings which they might desire to take.

Mr. Fulbright: But it is not admitted as an identification number for the record; is that your position?

Exam. Carter: Yes, that is true.

Mr. Gladson: I am still not very clear, Mr. Examiner, as to what the ruling was as to identifying exhibits. Perhaps it is my density, but I do want the record clear on this subject.

Exam. Carter: Well, for instance, you read in the record, the titles of certain exhibits. If you want to give some kind of a designation to those titles, for your own convenience and future reference, I will permit you to do that. In other words, if you have the first Sioux City Exhibit, say, the Articles of Incorporation, you might refer to it as Sioux City Exhibit A. If the second one was some other paper you might say that that was Sioux City Exhibit B.

Mr. Gladson: Yes.

Exam. Carter: And I will allow that designation to appear in the record. Now, is that clear?

Mr. Gladson: Now, let me ask you, Mr. Examiner, will you allow, after they have been so marked, an offer to admit those particular exhibits?

Exam. Carter: What did he say there?

(Mr. Gladson's remarks read.)

[fol. 929] Mr Gladson: In other words, will you allow us to offer them in evidence?

Exam. Carter: I have ruled that they were inadmissible. I have ruled that testimony of that character was inadmissible and, of course, if you want me to make the ruling over again, I will make the ruling over again. I have already made the ruling. That is clear to me.

Mr. Gladson: I am clear on that, but the thing I am inquiring about, I want to make my record as to what I want to prove so that when the Commission or the courts get it, they will know specifically what I expected to prove by this witness. Now, one of the steps in making the record, even though we know what the ultimate ruling of the Examiner is going to be as to admissibility, is to mark the exhibits and offer the exhibits in evidence and then get the specific ruling of the——

Exam. Carter: I am not going to permit the detailed offer of testimony which I have ruled is inadmissible.

Mr. Gladson: And that includes—you are not going to permit, as I understand it, the marking of these specific exhibits and offering them in evidence. Am I correct in that understanding?

Exam. Carter: Yes, I think you are—that is my ruling.

Mr. Gladson: And, as far as the specific evidence which this witness was going to make orally in connection with these various Stock Yards, am I correct in my understanding that the Examiner will not permit that evidence to be developed by question—in question and answer form?

[fol. 930] Exam. Carter: That is correct.

Mr. Gladson: And, Mr. Examiner, may I preserve a specific exception to each of these last rulings?

Exam. Carter: Yes, note an exception to each of the last group of rulings.

Mr. Gladson: Now, one of my associates suggest- that I ask this question: If we take advantage of the Examiner's offer to put certain private marks on these exhibits at Sioux City and these other Yards, will they be received as marked exhibits by the Examiner, or will we mail them to the Commission, or just what disposition——

Exam. Carter: They will not be received by the Examiner. You will mail them to the Commission with any petition that you might desire to file.

Mr. Gladson: Then, I am wondering if we might have it understood with Mr. Smith, that instead of taking up the time of the Examiner, that Mr. McDougall and Mr. Hamilton, our associates, might get together and identify these

exhibits so that they may be mailed to the Commission in connection with our petition.

Mr. Smith: Mr. McDougall will be available to participate in that exercise and will be glad to join with Mr. Hamilton in putting his initials on these documents that their identity in that way will be fixed. It is my understanding of what you have in mind, Mr. Gladson, that all of these documents to which you now refer and suggest that Mr. [fol. 931] McDougall and Mr. Hamilton identify, are documents relating to the situation at these Stock Yards other than Chicago; is that a correct understanding?

Mr. Gladson: That is a correct understanding, and covermost, if not all, of the posted markets in the country.

Mr. Smith: Other than Chicago.

Mr. Gladson: Other than Chicago.

Mr. Fulbright: Mr. Examiner, I understand that if we desire to do so we may follow that course and I understand that the Examiner has ruled that he will not permit us to take these exhibits up one by one and ask the witness what he would testify as to those exhibits, as to the preparation of them. In other words, not being able to make our offer of proof as we desire to make it, we will therefore have to resort to the other method of presenting the matter to the Commission.

Exam. Carter: That is correct.

Mr. Fulbright: We except to the Examiner's ruling in refusing to let us make our offer of proof as we think it should be done.

Exam. Carter: Note the exception.

Mr. Gladson: You may cross-examine.

Cross-examination.

By Mr. Smith:

Q. You referred to the fact that the Yards Company was not a member of the A.A.R. or the American Short Line Association, as being evidence that it was not a common carrier; did you not?

[fol. 932] A. I referred to the fact that they were not members of those, but I prefer to leave for Counsel the conclusion to draw from that.

Q. I thought you yourself stated the conclusion that that indicated, among other things, that Yards was not a com-

mon carrier, or, whatever you did say about it, do you or do you not say that it does so indicate?

A. In my opinion——

Mr. Fulbright: I object to that. The witness has already stated that he will not answer that question, that that is a conclusion for his counsel.

Exam. Carter: Read that question back.

(Question read.)

Exam. Carter: Well, he did make that statement and, as I recall it, from that statement, he stated a conclusion.

Mr. Fulbright: That is all right if he did, Mr. Examiner, he can state it again, whatever his conclusion was.

By Exam. Carter:

Q. Didn't you, Mr. Heinemann?

A. Here are my words: "The railroads have never invited the Stock Yards Company to join the Association of American Railroads or its predecessor, or the American Short Line Railroad Association." That is the complete sentence, if you please, sir.

By Mr. Smith:

Q. Now, Mr. Heinemann, we will pause for a moment on this, but isn't that one of — items that you referred to in support of the general proposition that you advanced that [fol. 933] this company was not a common carrier, along with the making of waybills and bills of lading and claims for refunds and what not?

A. I merely stated that as a fact, along with other facts as to our status out there in our operation of that property. As to whether that does or does not make us a common carrier, or keeps us from being a common carrier, I would prefer to leave to Counsel.

Q. Well, I suppose for the purpose of appraising the significance of that fact of non-membership you made an investigation, did you not, to determine just how much mileage of the company is a member of that association or those associations and how much is not? You went into that, did you not?

A. I did not, Mr. Smith, as to the mileage, no sir.

Q. So you are not able to advise the Commission whether that is a matter of any significance or not, are you?

A. In what regard, please?

Q. Read the question?

(Question read.)

A. I don't believe the Commission would need any advice from me as to what significance it bears. I know from my general knowledge and experience of the two associations that they do comprise substantially all of the railroads of the country. I have never made any test as to what mileage was represented.

Q. Well, for all you know, then, there may be thirty per cent of the railroad mileage of this country that does not [fol. 934] have membership in either one of those associations; is that so?

A. There might be.

Q. Now, another one of these items, we will say, of interest which you referred to was that the Union Stock Yards did not make out waybills?

A. That is right.

Q. Now, I suppose you have made an investigation with reference to the terminal or switching lines of Chicago generally, in order to determine what significance to attach to that fact as bearing upon the common carrier status of the Respondent, did you not?

A. I have a reasonable knowledge of that condition.

Q. Well, then you know, do you not, that the Chicago Junction Railway, which was held by the Supreme Court to be a common carrier, the Chicago River and Indiana Railroad lessee, likewise does not file or prepare waybills?

A. I assume that you mean——

Mr. Gladson: Now, just a minute Mr. Examiner. I don't think Mr. Smith's assumption in that question is correct.

Mr. Smith: Well, I think that I will withdraw that question. I think it is objectionable, Mr. Gladson.

By Mr. Smith:

Q. You know, do you not, that prior to the time it made its lease to the Chicago River and Indiana Railroad, the Chicago Junction did not prepare waybills?

A. By waybills I assume that you mean the ordinary revenue waybills such as is in general use?

[fol. 935] My answer to the witness' question is that I am using the term just as I understand he used it in his testimony, if that will clear it up?

A. Of course, I was referring, if you please, to waybills covering live stock originating at points destined to the Union Stock Yards and the waybills on live stock originating at the Union Stock Yards destined to other points. Answering your question, in the light of that, the Chicago Junction did not make such waybills.

Q. Did the Chicago Junction prepare any waybills with reference to traffic moving to or from Chicago?

A. I will have to answer that in a general way by saying that the district agency out there is likewise the district agency of the Chicago Junction Railway. I don't know to what extent Mr. Kemp's office treats that association or the division of authority between the Chicago Junction and the other lines. Ordinarily, I think this will answer your question, the waybills would be made by the line haul carriers.

Q. Well, let's just go through a few of these, if you don't mind. What about the Chicago River and Indiana Railroad Company, lessee, does it make waybills of the traffic moving to and from Chicago?

A. That answer would be the same.

Q. And does the Chicago River and Indiana—no, I covered that—the Baltimore and Ohio Chicago Terminal Railroad Company, does that make waybills on traffic to and from Chicago?

A. I have not examined that lately but I am inclined to [fol. 936] think they do, Mr. Smith. I think that they do certain terminal work for the B. & O.

Q. You don't know about that?

A. No.

Q. Well, I won't pursue it any further if you don't know about it. What about the Belt Railway Company of Chicago, do you know about that?

A. As a general proposition they would not make waybills on traffic outside the switching district.

Q. Yes, and what about the Chicago and Western Indiana?

A. That would be true.

Q. And the Chicago and Illinois Western?

A. That is an Illinois Central proposition. That would be true.

Q. Well, without pursuing this thing to its ultimate end, Mr. Heinemann, the fact is that, with negligible if any exceptions, the Chicago Switching, so-called switching or terminal lines do not prepare waybills on traffic moving to and from Chicago; do they?

A. That is true.

Q. Now, you had something also to say about bills of lading?

A. Yes, sir.

Q. And the preparation of those as being of significance in the appraisal of the status of the Yards Company as a common carrier?

A. Yes, sir.

[fol. 937] Q. And you have made an investigation to determine to what extent bills of lading are made by these terminal switching lines; have you?

A. I know something about it.

Q. Well, what about the Chicago Junction Railroad prior to its lease, did it issue waybills or bills of lading?

A. Yes, sir.

Q. On what traffic?

A. For the account of the carriers using its union freight station.

Q. Well, now, just elaborate on that a little bit because my information is otherwise?

A. Well, they operated several so-called union freight stations where they received freight in less than carload quantities for the account of——

Q. Oh, less than carload traffic?

A. Yes, sir.

Q. What about carload?

A. Ordinarily they did not, except strictly within the limits of Chicago.

Q. Not on carload traffic moving to and from Chicago?

A. No, sir.

Q. What about its lessee now, what does it do in that regard?

A. The same is true there.

Q. And what about the C. W. & P. S.?

A. That would be true also.

[fol. 938] Q. And what about the C. R. T. Company; what line is that?

A. The elevated.

Q. Well now, the fact of the matter is that there are many of these so-called switching or terminal lines in Chicago which, likewise, do not make out bills of lading on carload traffic moving to and from Chicago?

A. That is true, again with the reservation that Mr. Kemp, the District Agent at the Union Stock Yards represents all Chicago lines and I don't know what his internal arrangements are as far as his office is concerned.

Q. All right, the record will show that reservation. Well now, you made some point of the handling of claims and refunds. Won't you tell the Examiner that it is true also with reference to most, if not all of the Chicago Terminal Lines that, with respect to traffic moving to and from Chicago, those matters are handled by the trunk line?

A. Under your Freight Claim Agent's Association rules, ordinarily, the switching line is required only to show that its shipments were delivered under a clear seal record, and that leaves to the road haul line the matter of handling the investigation of the claims, with this added exception, again, that those switching lines that may be a party to the Freight Claim Agent's Association, may be called upon to pay their pro rata share, which is not true in the case of the Stock Yards. We are not a subscriber to that agreement and, of course, we cannot be drawn in without a specific provision in each case.

Q. If you damage these animals in the process of loading [fol. 939] or unloading, you are relieved from participating in the payment of claims arising out of that negligence; are you?

A. I did not so state.

Q. Well, I am asking you?

A. We are not relieved but the claim would be presented against the live stock contract issuing line on outbound shipments and the road haul line on inbound shipments.

Q. Now, in answer to a question of your counsel, you said that if you were relieved from filing tariffs with the Interstate Commerce Commission that you would file your tariffs covering the loading and unloading with the Secretary of Agriculture. Did I correctly understand your statement in that regard?

A. I believe I repeated Mr. Henkle's statement to that effect, he being the policy-making officer in that place. I

could, of course, not speak with authority on that as far as I am concerned but I don't think——

Q. Can you speak with authority on the question as to whether there has been any change in the Packers and Stock Yards Act since your company took the position in Docket 4109 that if it withdrew its tariff in the files of the Interstate Commerce Commission, the fixing of loading and unloading charges would be a matter of barter and trade?

A. I did not testify in that case. I can only testify——

Q. Just assume that my statement as to what was said by your company in that case is correct, for the purpose of the question.

[fol. 940] Mr. Gladson: Well, whether or not there has been any change in the P. & S. Act, is a question of law that Mr. Smith is as competent to look up as Mr. Heinemann.

Mr. Smith: Maybe you want to express an opinion on that, Mr. Gladson.

Mr. Gladson: Well, I don't know what the facts are. I don't know whether the act has been changed or not, but, if, in your proof, you want to point out that it has been changed, I won't quarrel with the fact.

Mr. Smith: Well, if Counsel does not have in mind that there was any change why that is all right.

By Mr. Smith:

Q. Now, on your exhibit for identification, No. 25, one of the early pages of the tariff offered in connection with that exhibit, you showed the——

Exam. Carter: 24 or 25?

Mr. Smith: I beg your pardon?

Exam. Carter: Do you mean 24 or 25? Do you mean that big one?

Mr. Smith: 24, yes.

By Mr. Smith:

Q. Will you turn to the first page of your exhibit for identification 24, please?

A. Yes, sir.

Q. Turn, if you will, to the tariff excerpt which refer to the Union Stock Yard and Transit Company as an industry?

A. Yes, sir.

Q. Do you have that before you?

A. I do.

[fol. 941] Q. Do you find any railroads named in that tariff as industries, along with the Stock Yards?

A. Only to the extent that you do have some points where they treat, for instance, a supply yard as an industrial track.

Q. Exactly. Do you find named in that tariff such roads familiarily referred to by the following initials: B. O. C. T., the Belt Railway of Chicago, C. E. I. Railway, C. C. R. R. Railway, C. E. R. R. Railroad, C. N. W. Railway, C. W. I. Railroad, C. B. Q. R. R., the I. C. L. R. R., Soo Line, the Chicago Rock Island and Pacific, Illinois Central, the Pennsylvania, the Wabash, as examples, do you find reference to any of those?

A. I am sorry but I just have that one page of listings; I did not bring down that tariff.

Q. Well, from your familiarity with these tariffs, which I think the record shows in a rather general way, is what I have said correct, that the tariff does show these many railroads as industries?

A. No. The tariff does show certain points such as a supply yard where they are willing to receive supplies as an industrial location for that particular railroad's property.

Q. That is, if there was a place that one of those railroads had a plant where they received, we will say, 800 to 1,000 cars a year over the lines which joined in that tariff, why, there would be reference to that railroad, would there, or to its plant as an industry?

A. I don't know. It would not be predicated upon the [fol. 942] fact that—upon the fact that they might or might not receive 800 to 1,000 cars, it would be predicated upon the fact that they had available there a certain track which they preferred to have designated as an industry and that might be, and I happen to know that it is, in some cases, because of the fact that they are buying supplies there which, under the terms of the purchase, they elected to take delivery there, so that the seller, who may have contracted at a delivered price, may have a proper designation for delivery under your reciprocal switching rates.

Q. There would be the same reason for being named there that there is for the Union Stock Yards which receives 800

to 1,000 cars a year at its industrial location being named there; is that true?

A. We are not receiving 800 to 1,000 cars a year at these particular locations exclusively. Those locations represent the identification of our chute tracks on which we receive many thousand cars consigned to us.

Q. Well, you do receive many cars; you are an industry in Chicago?

A. We receive those cars but they are not received or delivery taken on the Chicago Junction Track, which are set there. The Chicago Junction is the terminal carrier that effects delivery of certain supplies upon industrial tracks which are strategically located throughout our Yard area.

Mr. Smith: That is all.

[fol. 943] Redirect Examination

By Mr. Fulbright:

Q. Well, where you refer to the Chicago Junction, do you mean the Chicago Junction Railway Company?

A. There is no operating company known as the Chicago Junction Railway Company. I am sorry, but I have fallen into the habit that we have around the Yard there of always referring to this as the Chicago Junction. I would like, in all cases, to have it understood that it is the Chicago River and Indiana, lessee of the Chicago Junction Railway's tracks.

By Exam. Carter:

Q. Is the Stock Yards Company ever a shipper or receiver of live stock?

A. No, sir.

Q. You stated that you were familiar with the corporate history of the Chicago——

A. I didn't hear you.

Q. You stated that you were familiar with the corporate history of the Chicago Junction and the Stock Yards Company. Are you familiar with the lease from the Chicago Junction and Chicago River and Indiana——

A. I don't remember of stating that I was familiar with it but I have read that lease.

Q. Well, that is all right. That will be all. I have no other question.

By Mr. Fulbright:

Q. These terminal railway lines, switching lines referred to by Counsel, do perform a transportation service between [fol. 944] points within the Chicago switching district, do they not, in whole or in part, such as the Chicago Belt?

A. The Belt Railway of Chicago, yes, that is true, and in the majority of instances those lines will be owned or control-ed by road haul lines through stock ownership as reported to the Commission.

Q. Where they are making movements between points within the switching district, do they prepare waybills generally?

A. Not in a strict sense, Mr. Fulbright. That is why I sought to distinguish between the ordinary switching bill and your revenue waybill. I do not believe, in your ordinary accounting parlance, you would call those waybills, although they might technically be waybills.

Q. They perform the same function for the movement, though, do they not?

A. Oh, yes.

Recross Examination

By Mr. Smith:

Q. Who else could prepare them? In the case of those intra city movements, only by switching, they would have to prepare any records that were prepared, wouldn't they?

A. Yes, sir.

Redirect Examination

By Mr. Gladson:

Q. Mr. Heinemann, a shipment comes in on the B. & O., for instance, destined to a point on the B. & O. C. T., which is a switch line. Is the B. & O. C. T. shown as one of the participating carriers on the waybills and also the bill of [fol. 945] lading?

A. Yes, sir.

Mr. Gladson: Mr. Examiner, I am not sure whether I offered Respondent's Exhibit 26, which is the copy of the form of contract used by the Illinois Central in connection with trucking companies which gather up live stock for it, in the country.

Exam. Carter: As I recall, I admitted that for what it was worth.

Mr. Smith: I didn't think that you did. I know that there was a ruling upon it.

Examiner Carter: I think I stated that I would admit that exhibit but I did not think that it was material.

Mr. Fulbright: It was admitted.

Mr. Gladson: Well, that is your ruling now if it has not already been admitted.

Exam. Carter: Yes.

Mr. Gladson: That is all we have, Mr. Examiner.

(Witness excused.)

Mr. Smith: Before they close their case, I want to offer some of the material which is filed.

I offer first, the so-called red book of the Union Stock Yard & Transit Company of Chicago, showing the annual live stock report for the year 1936 and a summary for the years 1865 to 1936 which have been supplied to me at my request by counsel for the Yard Company, which was referred to by the Examiner at the time that Mr. Henkle was on the stand.

[fol. 946] Exam. Carter: That will be Exhibit No. 28.

Mr. Gladson: If I have not already agreed not to object to it, I now object to it on the ground it is not material. If I did agree to it I will live up to my agreement and withdraw the objection.

Exam. Carter: Your objections will be noted. The exhibit is received.

(Protestant's Exhibit No. 28, Witness Henkle, received in evidence.)

Mr. Smith: We offer as Exhibit No. 29 the contract that was referred to while Mr. Henkle was on the stand, bearing date April 16th, 1916 and headed Western Weighing and Inspection Bureau, between the Western Weighing and Inspection Bureau and the Chicago Live Stock Exchange and having reference to the use by the carriers of the weights obtained by the live stock shippers from the Yards Company. That has been referred to in the record for convenience as being Exhibit No. 16, in Docket 4244.

Mr. Gladson: I wonder if you are not going to favor me with a copy.

Mr. Smith: Oh, pardon me. We offer as Exhibit No. 30——

Mr. Gladson: Well, just a moment. What about 29, has that been offered?

Exam. Carter: Yes.

Mr. Gladson: Do you want me to make my objection, if any, now?

Exam. Carter: Yes.

[fol. 947] Mr. Gladson: Mr. Examiner, as I recall the testimony at the time Mr. Henkle was on the stand, this was to be filed within ten days and we would be given an opportunity to point out anything about it that would not be correct. I am not in a position to check it this afternoon, and I take it that whatever the record shows at the time of the original motion will be open to us.

Mr. Smith: Your recollection is wrong, I think, on that, Mr. Gladson. What I think the record shows here that we referred to this fact and I said to the Examiner, in response to something that Mr. Heinemann had said, that I did understand that there had been some changes with reference to the amount of shrinkage that would be allowed and the Examiner said that he did not care anything about that and then I said: "If you will give me permission, I will offer this within ten days," and I had an opportunity to get it prepared before that time. Now, you can have some time if you want to, I am not objecting to that.

Exam. Carter: That will be received, subject to any check you may desire to make as to its accuracy.

(Protestant's Exhibit No. 29, Witness Henkle, received in evidence.)

Mr. Smith: We offer as Exhibit No. 30, a form of contract submitted or given to me by Mr. Henkle in response to my request that he do so while he was on the stand. Mr. Henkle [fol. 948] is here and can correct this statement if it is incorrect. I understand from his testimony and from the fact that he has handed me this document, that this is the form of contract which was presented by the Yards Company to the Chicago Lines with the request that they execute it, and, as executed, observe its several provisions.

We offer that as Exhibit Number 30.

Mr. Gladson: Well, Mr. Examiner, I doubt whether he has correctly quoted Mr. Henkle's testimony, but the record will speak for itself as to what Mr. Henkle said. I do object

to this as not material or competent or relevant to this case. I furnished it to Mr. Smith at the request of the Examiner and I am not denying that it is a true and correct copy of the contract or proposed contract that was referred to on cross-examination of Mr. Henkle.

Exam. Carter: But you object to its materiality.

Mr. Gladson: Well, relevancy.

Exam. Carter: Relevancy.

Mr. Gladson: I don't think that it has anything to do with the issues in this case at all.

Exam. Carter: I will overrule the objection. Exception noted.

(Protestant's Exhibit No. 30, Witness Henkle, received in evidence.)

Mr. Smith: At our request Mr. Gladson, has furnished us a statement which I shall read into the record. Would [fol. 949] you prefer that I offer this as an exhibit so that you may make an objection to it?

Mr. Gladson: Yes, I would rather have it done that way. As I recall it, it was at the requirement of the Examiner rather than merely your request, Mr. Smith.

Mr. Smith: I think we can assume that with reference to everything that I have obtained here, Mr. Gladson.

Mr. Gladson: I think that the Examiner has been kind to you in view of all that you requested.

Mr. Smith: I have here an exhibit marked Exhibit No. 31, for identification, which contains information supplied me at my request.

Mr. Gladson: At the Examiner's request.

Mr. Smith: By Counsel for the Yards and which, as I understand it, purports to show the annual rental for the periods indicated on the document which the Yards Company received from its lessee, as the rental for certain property under the lease of the 15th of September—the 15th of December, 1897, between the Union Stock Yard and Transit Company of Chicago and the Chicago and Indiana State Line Railway Company, and its successors; the property referred to being the property leased to the subsidiary of the New York Central, under the lease of 1922, and I will state, further, that is my understanding that the rental on that document has been arrived at in accordance with the terms of that lease, as more specifically set forth in Articles Five and Six thereof. Is that correct, Mr. Gladson?

[fol. 950] Mr. Gladson: Well, in the first place, Mr. Smith, I think you have incorrectly designated this income as rental. We are not going to admit that, technically, this is rental. We do admit that this is income that is received from the Chicago Junction during the profit sharing days and under the profit sharing agreement which has heretofore been put in this record, as I recall it, as part of Exhibit No. 3.

Mr. Smith: That is right.

Mr. Gladson: Now, as to the accuracy of those figures and subject to the corrections that I have made, I am not going to quarrel with the accuracy of the figures because they are the ones that we furnished. They are income that we received from the Chicago Junction during the profit sharing days.

Exam. Carter: Well, is it true that they are arrived at in accordance with the provisions of the lease referred to by Mr. Smith; that is, Paragraphs Five and Six, did you say?

Mr. Smith: Yes.

Mr. Gladson: Well, I am not particularly familiar with those paragraphs, but they are the amounts actually received from the Chicago Junction in accordance with that particular agreement or lease or whatever you want to call it.

Mr. Smith: In consideration of the proposed lease under that document?

Mr. Gladson: That is right.

Mr. Smith: Yes. We offer Exhibit No. 31.

Mr. Gladson: I object to this exhibit as not germane to [fol. 951] the issues in this case and not relevant.

Exam. Carter: The objection will be noted and Exhibit 31 will be received.

Mr. Gladson: Exception.

(Protestant's Exhibit No. 31, Witness (none), received in evidence.)

Mr. Fulbright: Mr. Examiner, I am not sure that while Mr. Heinemann was on the stand that any offer of proof was made upon one question upon which I wanted to make the offer of proof. Mr. Heinemann testified as to his qualifications, that he had examined the files of the Commission and the tariffs relating to the loading and unloading of live stock and the conditions at the various yards. I wanted the record to show that—Mr. Heinemann, come here!

C. B. HEINEMANN recalled, previously sworn, testified as follows:

Direct examination.

By Mr. Fulbright:

Q. Mr. Heinemann, if you were asked if you had examined and determined which of the 136 live stock markets with stock yards performing loading and unloading service for the railroads had filed tariffs with the Commission, what would be your answer? Would you answer that you had or had not made such an examination?

Mr. Smith: That is objected to as immaterial.

Mr. Fulbright: I am just laying the predicate.

Exam. Carter: Sustain the objection.

[fol. 952] Mr. Fulbright: We offer to prove that this witness would testify that he had made an examination to determine which of these yards filed tariffs with the Commission covering the loading and unloading service.

Exam. Carter: The offer to prove is denied.

By Mr. Fulbright:

Q. Now, Mr. Heinemann, if you were asked a further question as to whether or not any of these yards, performing the loading and unloading service other than the Respondent, filed tariffs with the Commission, except the Union Stock Yard and Transit Company, Respondent in this case, what would your answer be?

Mr. Smith: Same objection.

Exam. Carter: Same ruling.

Mr. Fulbright: Same ruling. We offer to prove that this witness, if asked this question, would reply that the only yard filing such tariffs with the Commission is the Respondent in this case.

Exam. Carter: Your offer is denied. Of course you have an exception to all those rulings.

Mr. Fulbright: Oh, yes, we understand that we have exceptions to all of them.

Exam. Carter: All right, Mr. Heinemann, that will be all. Have Respondents anything in addition?

By Mr. Fulbright:

Q. Mr. Heinemann, are you familiar with the provisions of the tariffs of the carriers in the southwest with respect to the handling of cotton at transit points?

[fol. 953] Mr. Smith: Objected to as immaterial.

Exam. Carter: Sustain the objection.

Mr. Smith: Pardon me, Mr. Fulbright, before I forget it—you don't need to take this.

Exam. Carter: Off the record.

(There was a discussion off the record.)

Mr. Smith: May I now ask this question on the record? A certain exhibit was marked for identification here—I think that it was Exhibit 24. A manuscript had been prepared to be read, in conjunction with the submission of that exhibit. That manuscript contained a number of references to tariffs which carried rates to and from Chicago and tariffs which also carried rates to and from other points. In addition to that, as I understood it, the thing had been put up in such a form that it also contained a number of pages that related solely and only to points other than Chicago. Now, the Examiner did not require, with reference to this category that I have referred to, that the reference to points other than Chicago be specifically eliminated because it obviously would be a matter of great inconvenience to the Yard Company, to do that, but other excerpts are not admitted into the record, and because of the way that exhibit was gotten up, I certainly had the impression, the physical matter—as a physical matter that they were all in there, and I am asking now whether that physical exhibit marked as I have indicated, has been revised to bring it into con-[fol. 954] formity with the ruling of the Examiner? Do I make myself clear on that, Mr. Examiner?

Exam. Carter: Yes, it is clear to me.

Mr. Gladson: I am not clear on it.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Fulbright: No, it has not been so done.

Mr. Smith: As I understand it, the Examiner said, however, that he would not require that that be taken out, where that particular page also referred to practices in Chicago, but that the other part of it which did not refer to Chicago, was not in evidence in this case.

Now, I come to the second inquiry: There were many provisions in this manuscript which were deleted in the first reading; those, mainly, which were read by the witness this morning and those, as I understood, referred to pages in this exhibit that had been incorporated physically in

that exhibit. Now, those pages were not admitted into the record; there was no reason why there should be—I mean, it was not necessary, because of meeting the difficulty in which the Yards Company found itself concerning the pages that had to do with Chicago and other points. Now, have all of those pages that Mr. Heinemann referred to this morning in his testimony here today been deleted from that exhibit?

Mr. Gladson: Physically deleted, Mr. Smith?

[fol. 955] Mr. Smith: Yes, exactly.

Mr. Gladson: No, they have not.

Exam. Carter: Well, I will direct that those pages be physically deleted from Exhibit 24.

Mr. Gladson: Well now, Mr. Examiner, they are in the hands of the Examiner and they are government property and I am not going to undertake to delete them.

Exam. Carter: I mean I am going to direct, some official of the Interstate Commerce Commission to delete them.

Mr. Gladson: Well, I want to except to that. You don't mean by that, Mr. Examiner, that they will be physically removed from the file and be destroyed, or something of that sort?

Exam. Carter: They will be physically removed from that exhibit and a notation made of what was physically removed.

Mr. Smith: That is exactly what ought to be done with them. They ought to be taken out and thrown in the fire, if the Examiner please. It was specifically ruled that they were not to go in here and they are in here by chance and by the circumstance that I have been describing here. They were put in there originally and they simply were not taken out as they should have been when the Examiner ruled them out.

Mr. Gladson: Well now, Mr. Examiner, if the Commission deletes this document, I wonder if we might be advised at that time of the pages, items and paragraphs and so forth that have been deleted?

Exam. Carter: As I understand it, this refers to the pages [fol. 956] of Exhibit 24 which were held to be incompetent.

Mr. Smith: This morning.

Exam. Carter: Yes.

Mr. Smith: That were covered by these excerpts in the manuscript that were not read the other day but were read here by the witness this morning and the exhibit simply had

not been brought into conformity with the ruling of the Commission.

Exam. Carter: I think I have stated what would be done.

Mr. Gladson: I am wondering, Mr. Examiner, if this deletion, when it takes place, as far as this exhibit is concerned, might be held up until after the Commission has passed on the motion that we propose to file?

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: I want this to be perfectly clear, Mr. Examiner: Where there is a provision or a page in this tariff that refers to the situation in Chicago, and the same provision or the same page refers to the situation at some other point, I am not saying that Counsel should be put to the inconvenience of separating those two and picking out physically for this record only that part that relates to Chicago, but I am perfectly content with the ruling of the Examiner.

Mr. Gladson: You should be.

Mr. Smith: That as to the material at points other than Chicago it simply will not be considered in this record, but, with reference to those provisions and those pages that re- [fol. 957] late solely to these other points that Mr. Henkle testified to this morning, it is purely an adventitious circumstance that they are in his record at all and, in accordance with the ruling of the Examiner, as he said, they ought to be deleted.

Mr. Gladson: You mean Mr. Heinemann?

Exam. Carter: Mr. Heinemann instead of Mr. Henkle.

Mr. Smith: Yes.

Mr. Fulbright: Mr. Examiner, I wish to offer to prove that this witness, if permitted to answer the question as to his familiarity with the tariffs and practices in the handling of cotton in the southwest, at transit points, would answer in the affirmative. My offer, I assume, is overruled.

Exam. Carter: Overruled.

Mr. Fulbright: And we except thereto.

By Mr. Fulbright:

Q. Now, Mr. Heinemann, if you were asked a further question as to whether or not the rates applicable on cotton are so constructed that they carry with them the obligation upon the carriers to unload and load the cotton at these transit points, and whether or not the agencies which

perform that service did so under private contract and did not file tariffs with the Commission, what would your answer be?

Mr. Smith: That is objected to as immaterial and we petition the Examiner to rule that we will not have to go through here with reference to cotton everything that we have already gone through with reference to live stock at these other points.

Exam. Carter: I sustain the objection.

[fol. 958] Mr. Fulbright: We merely offer to prove, Mr. Examiner, assuming that the same rulings will be made on that, that with respect to the cotton traffic there is an analogous situation. This witness will testify that the agencies handling such cotton for the carriers do not file tariffs with the Commission, and I assume that that will be acted upon in the same way.

Exam. Carter: Yes, the offer is denied.

Mr. Fulbright: And with respect to ship-side traffic, where rates are published to ship-side, to all of the ports in the United States, and carry with them the obligation upon the carriers to unload and place that cargo or shipment within reach of the ship's tackle.

Mr. Smith: Is this a question?

Mr. Fulbright: No, I am just making the statement that the same situation exists there as to the independent agencies. I merely want to show on the record here that we would undertake to prove an analogous situation with respect to ship-side traffic at the various ports; namely, that there are independent contractors, li-terage companies, wharf companies, dock companies which perform those services for the public and are not required and do not file tariffs with the Interstate Commerce Commission.

Mr. Smith: Well, I don't know what that is, but whatever it is, whether it is evidence or a statement of Counsel, or what, I object to it as immaterial.

Exam. Carter: Sustain the objection.

[fol. 959] Mr. Fulbright: I offer to prove those matters by this witness and I assume that that is overruled and I take an exception.

Exam. Carter: Your offer is denied. Have the Respondents anything more at this time.

Mr. Gladson: Mr. Examiner, we intended to ask Mr. Heinemann about the tariff circulars and whether the tariff circulars with the Commission provided for the publishing of loading and unloading charges. I assume that would

come practically in the same category as these other things on which we have been denied the opportunity to offer proof and we will cover that also in our motion to the Commission, if that is the ruling.

Exam. Carter: I don't know just exactly what you want to offer in that respect. What is it?

Mr. Gladson: Well, suppose we let Mr. Heinemann make his statement, and I take it that Mr. Smith may not——

Exam. Carter: Well now——

Mr. Smith: I would like to be apprised of what it is that Counsel is now proposing to offer, by the question.

Mr. Gladson: Suppose that we read it on the record and so that you can hear it.

By Mr. Gladson:

Q. Mr. Heinemann, does the Interstate Commerce Commission prescribe regulations which provide for the filing,—require the filing of loading and unloading charges in the tariffs of the carriers?

Mr. Fulbright: You are speaking of live stock?

[fol. 960] Mr. Gladson: Yes, live stock.

A. There is no specific provision in their tariff circular No. 20 that requires that specifically, as to live stock. There is a general provision in Rule 10 as to the filing of tariffs, covering certain terminal services as enumerated therein, but, under the application of that rule, the section referred to special services not directly a part of the transportation covered by line haul rates which would, of course, exclude live stock by statute, as I understand it, ordinary live stock.

Exam. Carter: That concludes the Respondent's Case?

Mr. Gladson: Yes, sir.

(Witness excused.)

Mr. Fulbright: That completes it, Your Honor, subject——

Exam. Carter: I mean, subject to your exceptions.

Mr. Fulbright: Subject to our protest against having closed the——

Exam. Carter: We will recess for five minutes and then go on with your testimony.

(Recess taken.)

Exam. Carter: The Protestants may proceed.

Mr. Fulbright: Pardon me, I want to make a statement for the benefit of the record, and perhaps Mr. Smith would want to hear it before he proceeds. The Respondent wishes the record to show that respondent will proceed as promptly as practicable to file a motion with the Commission appeal-[fol. 961] ing from the ruling of the Examiner with respect to the testimony and the exhibits which were not admitted in evidence, particularly testimony and exhibits pertaining to the various other markets, and will refer to the exhibits which the record shows the Examiner has permitted us to designate by some appropriate lettering, which service will be performed by Counsel for the respective parties. We expect to follow that through, Mr. Examiner, as promptly as we can.

Exam. Carter: That is right.

Mr. Gladson: Of course, Mr. Examiner, in stating that we are doing that, we are not waiving any objections we may have to the Examiner's failure to allow the reporter to mark the exhibits, and other matters that we have raised.

Exam. Carter: That will be understood.

Mr. Smith: The Protestant railroads rest on the record as now made.

Exam. Carter: Is there any other testimony to be offered?

Mr. Quasey: Mr. Examiner, I have a statement to make.

Exam. Carter: What is your name?

Mr. Quasey: L. J. Quasey.

Exam. Carter: And what is your address?

Mr. Quasey: 160 North LaSalle Street, Chicago. I am Commerce Counsel for the National Live Stock Marketing Association.

Exam. Carter: Raise your right hand and be sworn please!

[fol. 962] L. J. Quasey was sworn and testified in narrative form as follows:

Direct examination.

By Exam. Carter:

Q. Will you state briefly what that marketing association is?

Mr. Gladson: Did I correctly understand Mr. Quasey to say that he, as Commerce Counsel was going to testify in this case?

A. I am offering a statement under oath in behalf of the National Live Stock Marketing Association and others, which I will get to promptly.

The National Live Stock Marketing Association is a Corporation, not for profit, composed of about 300,000 live stock producers and feeders, and affiliated live stock marketing associations engaged in the receiving and shipping and handling of live stock at practically all the primary markets of the country.

Its member associations handled approximately 100,000 carloads of live stock during the past five years.

The Chicago Producers Commission Association is a member association of the National Live Stock Marketing Association and it operates on the Chicago market at the Union Stock Yard and Transit here in Chicago and it has handled the business for approximately 40,000 members and patrons during the past several years.

I also have been requested to include in my statement of [fol. 963] protest the National,—or, the American National Live Stock Association which is a voluntary, non-profit organization of live stock producers in the United States, with its present membership located principally in the territory west of the Missouri River.

Also, on behalf of the Nat[illegible]nal Wool Growers Association, which is a voluntary non-profit organization, whose membership is mainly directly an affiliation of State Organizations of Wool Growers in about twelve of the Intermountain and Pacific States.

The Texas Southwestern Cattle Raisers Association also asks that the protest be made in their behalf.

Now, specifically, Mr. Examiner, we do not wish to go into detail in the matter of the evidence here. I think that the issue has been clearly defined and all of the matterial facts presented, but I wish to make this statement, that, under the provisions of Section 15-(5) of the Interstate Commerce Act, the carriers are required to perform loading and unloading of live stock at public live stock markets without additional charge.

In view of this, it is our belief that the best interests of the live stock producers will be best served by retention of jurisdiction by the Interstate Commerce Commission over the unloading and loading of live stock at the Union Stock Yards at Chicago.

Mr. Gladson: Just a minute now. I ask that that be stricken, Mr. Examiner, as argument of counsel. Perhaps [fol. 964] it may have a place in the brief but as to sworn testimony it does not appeal to me as being competent or material.

Exam. Carter: I will note that objection. I mean, your motion to strike will be noted on the record.

The Witness: I might say this, that this matter of the cancellation of the tariff in issue in this proceedings has been discussed by our officers and our executive committee and they have been acquainted with the facts and the opposition which I voice here is at their direction.

Mr. Gladson: I ask that that be stricken as not material, Mr. Examiner.

Exam. Carter: That motion will be noted on the record also.

The Witness: Mr. Examiner, that is all that I have to present at this time. I propose to file a brief, at which time we will go into the phases of the matter at length.

Cross-examination.

By Mr. Fulbright:

Q. The producer's main interest is seeing that he does not have an increase in his freight rates and that he does not have to pay an extra charge in addition to his freight rate for the unloading of live stock?

A. In the first instance that is correct, Mr. Fulbright.

Q. Naturally, he doesn't want to pay an extra charge for unloading carload traffic of live stock, does he?

A. Nor does he wish to pay any increased freight charges of any *any* character, whether they be line haul rates or [fol. 965] any other incidental services.

Q. You are anxious to preserve that protection which is evidenced in Paragraph 5 of Section 15 of the Interstate Commerce Commission as it was amended in 1920; is that right?

A. That is correct, with this additional construction, that we want the Interstate Commerce Commsision to have full control and jurisdiction over these charges for that specific service.

Q. Well, if you don't have to pay them, what difference does it make to the producer?

A. It makes this difference, Mr. Fulbright: We know that in the Western Live Stock case, Docket 17,000 Part 9, the Commission had before it various things having a bearing upon the reasonableness of the rates and the question of charges such as are involved here was one of the things that was considered by the Commission in that case, so that whether this matter comes against the producer directly or whether it would come in the form of an increase in the line haul rate is a thing that we are concerned about.

Q. Have any of your organizations ever complained to the Commission about the loading and unloading charges at any of the markets over the country?

Mr. Smith: That is objected to so far as it bears on any point other than Chicago.

Exam. Carter: Restrict the question, Mr. Counsel.

Mr. Fulbright: This witness has made a very general [fol. 966] statement here, over the objection of Counsel, about their general position on the subject and it seems to me that I am entitled to interrogate him as to what their position is, not only with respect to the Chicago market but with respect to the other markets.

Mr. Smith: He made a very specific statement with reference to their position concerning Chicago.

Mr. Fulbright: He made a very general statement.

Exam. Carter: I will sustain the objection as to the other markets.

Mr. Fulbright: Note our exception.

Mr. Fulbright:

Q. Are you connected with the American National Live Stock Association in any way?

A. Not except insofar as authority for making the statement that I have just made here is concerned.

Q. Well, you are not employed by them now, are you, in any manner?

A. No sir, not at this time nor in this specific proceeding.

Q. Or, are you employed in any manner by the Texas Southwestern Cattle Raising Association?

A. My answer is the same as it was in the case of the American National.

Q. You would make the same answer, I suppose, as to the National Wool Growers?

A. That is correct. I might say, in explanation of that, however, Mr. Fulbright, that those organizations, frequently, as they have in this case, cooperate and work to-
[fol. 967] gether on matters of mutual interest, particularly with respect to transportation.

Q. Now, in Docket 17,000 Part 5, wasn't it that you spoke of—no, Part 9, did the Commission pass upon the loading and unloading charges in that case?

A. No, it did not, as a specific matter in the proceeding.

Q. Now, did the Commission indicate in any way that that had anything to do with its orders as to the rates, the line haul rates in that case?

Mr. Smith: That is objected to on the ground that that decision is the best evidence of what it shows.

Mr. Fulbright: I think so too, Mr. Examiner. We can refer to it. That is all that I have.

Exam. Carter: Any other statement?

The Witness: No.

Exam. Carter: That will be all.

(Witness excused.)

Exam. Carter: Are there any other witnesses?

(No response.)

Exam. Carter: Do you gentlemen desire to file briefs?

Mr. Fulbright: Mr. Examiner, in view of the statement that has been made on the record, it is quite obvious that we would need quite a bit of time for the briefs. I am going to ask, if I may, to have ninety days fixed as time for filing briefs.

Mr. Smith: I represent that this matter ought to be dis-
[fol. 968] posed of with the greatest possible expedition.

Exam. Carter: Off the record.

(Discussion outside the record.)

Mr. Smith: Will Mr. Gladson make the statement which he did make, on the record, with reference to the Yards Company making any necessary extentions?

Mr. Gladson: I think that I made it on the record. If I did not, I will make it at this time.

Mr. Smith: What is it?

Mr. Fulbright: Don't worry about that.

Mr. Smith: What is the statement?

Mr. Gladson: Well, Mr. Smith, I have told the Examiner, and I have told you, and I have told everybody in the

room, and I think I have put it on the record, but in any event I will put it on the record again, that the Yards Company will voluntarily extend the effective date of the cancellation of the schedule a sufficient time to enable the Commission to dispose of this case, after mature judgment and after hearing all of the parties. Whatever time is necessary will be voluntarily given by the Yards Company.

Exam. Carter: Now, I assume, of course, you gentlemen want to argue this case. I have to ask whether you want oral argument.

Mr. Fulbright: Yes, oral argument and a tentative report.

Exam. Carter: You said a tentative report?

Mr. Fulbright: I think so.

[fol. 969] Exam. Carter: Do I understand that Respondent requests that a proposed report be issued in this case?

Mr. Fulbright: That is right.

Exam. Carter: Now, gentlemen, we had planned this visit to the Stock Yards tomorrow morning and, in view of that situation, I am going to adjourn the hearing today, this afternoon, until 10:00 o'clock Wednesday morning, and I might say that there probably won't be anything further Wednesday morning, but, I want to hold the record open until Wednesday morning in the event that we should desire any further testimony.

Now, off the record.

(Discussion outside the record.)

Mr. Smith: Does Your Honor understand, that the Respondent's Case has been closed for this hearing?

Exam. Carter: As I understand it, the Respondent's Case has been closed for this hearing and I am holding the case open solely for the purpose, that if it seems desirable for the Commission to obtain any additional testimony as the result of this visit to the Stock Yards tomorrow, that would be the only purpose for which the hearing would be held on Wednesday. Off the record.

(Discussion outside the record.)

Exam. Carter: Briefs will be due ninety days from Wednesday. Briefs will be due September 16th. We will adjourn until Wednesday morning at 10 o'clock.

(Whereupon, at 4:45 o'clock P. M., Monday, June 14, 1937, the hearing was adjourned until 10 A. M. Wednesday, June 16, 1937.)

[fol. 970] Chicago, Illinois, June 16, 1937.

Before: Paul O. Carter, Examiner.

Hearing resumed at 10 o'clock A. M. (D. S. T.)

Appearances: As heretofore noted, and the following additional appearances were entered.

Mr. Bouton McDougal, 11 South LaSalle Street, Chicago, Illinois, appearing for Atchison, Topeka & Santa Fe, Railway, E. T. C.

Proceedings

Exam. Carter: Come to order gentlemen.

Yesterday I visited the Stock Yards, and as the result of that visit I requested Mr. Heinemann and Mr. Kemp for a somewhat detailed description of operations of the railroads and the Stock Yard Company in the delivery of live stock at the Union Stock Yards, of inbound shipments and also outbound shipments. I understand that Mr. Heinemann and Mr. Kemp have agreed on a joint statement which purports to properly describe these operations and that Mr. Heinemann will read that statement into the record.

C. B. Heinemann, recalled, previously sworn, and testified further as follows:

[fol. 971] Direct examination:

The Witness: Shall I proceed without any questions?

Exam. Carter: Yes.

The Witness: Mr. Examiner, in accordance with your suggestion I worked with Mr. Kemp and we endeavored to set out a detailed statement of the operations in connection with the handling of inbound carload shipments of live stock and outbound carload shipments of live stock and, with your permission, I shall read the statement as prepared.

The first part of the statement will relate to inbound shipments.

When the train arrives at its terminal, notice is given by the line haul carrier to the despatcher of the River Road as to the number of livestock cars and contents of cars set out to be switched by the River Road because of the fact that they contain freight destined to other places.

The live stock superintendent of the Union Stock Yard &

Transit Company in charge of the receiving office gets this information from the River Road and gives information as to which platform train will be unloaded at, and forwards it to the foreman in charge of the platform where these cars are destined to be set. He then informs his crew on that platform that a certain number of cars from a certain railroad are due in so many minutes. Sometimes they arrive on time and sometimes they are late, due to a set-out or to being held back by switches on other railroads. This information is transmitted by telephone, loud speaker or [fol. 972] orally.

When the train arrives at the platform designated, the crew under the direction of the platform foreman immediately starts to work. The barman opens the doors. During the winter with the snow and ice and large quantities of manure in the cars which has been used for bedding in addition to some fresh bedding, four or five men are required to open the door. When the door is opened, the crew puts in the bridges connecting the car with the platform; members of the unloading crew bring over the gates and set up the special boards alon-side the cars so that no animals will slip down to the ground. They then proceed to unload.

In the case of cattle, sometimes it is necessary to stand in front of them to prevent them from coming out too fast in order to prevent crowding at the doors and injury of the cattle. At other times, it is necessary to go into the car to scare them out by alarming them or by use of actual force. When bulls are tied in the car, it is necessary to cut the bull ropes from the outside and yard these bulls in a separate pen so that they do not injure the other cattle consigned in that load.

During the summer it is easier to unload all these—to unload all three species than it is in the winter when the weather is often bad. The cattle are put into chutes which are all numbered. The checker follows down and takes the car number (form 91A), pulls out the bridge, makes a [fol. 973] record of the chute into which the car was unloaded, and pulls out the sideboard, keeping the crew in continual motion all of the time.

This form 91A is a book which has its make-up to provide for an original and a duplicate. It is designed to show the information called for in the spaces indicated. The origi-

nal is retained in the book. The carbon copy is left on a clip on the unloading platform for information of those interested. Shippers and the consignee can thus learn where their cars are set and at what chute unloaded.

Form 91-A I have mentioned contains space for the following information: Railroad, engine, train number, marks, date, train in and train out. Then, in the columnal heading there is a provision for the car number, chute, contents, deads and cripples.

At the bottom of the page is a space for the name of the man, checked by, and for the number of men and the number of partitions in the particular train unloaded.

Mr. Quasey: Can you give us a copy of that, Mr. Heinemann, and also the shippers?

Mr. Heinemann: Yes, sir.

Mr. Gladson: Number of men? What do you mean by that?

A. Number of men engaged in the service.

If the consignee is not ready to take delivery at the chute gate before it becomes necessary to again make use of the [fol. 974] same chute pen, the yardmaster with his assistants and a crew in the alley back of these unloading chutes take the livestock to convenient holding pens. The animals are counted out of the chutes when delivered or when placed in holding pens. Form A-481 is a memo book and is retained by the assistant yardmaster. It is afterward filed at the receiving office.

This form A-481 is a book with a folio spread containing spaces for the following information: Platform, numbers—in the columnal headings, chute, block, pen and division. At the bottom of the page is a space for the information concerning: "Yarded by—", with a space for the name of the employee.

By Exam. Carter:

Q. Now, just at that point, Mr. Heinemann, are you going to have later in your statement a description of—I mean, are you later on going to have in your statement information showing, for instance, that sheep are always driven by employees of the Yard Company?

A. Yes, sir.

Exam. Carter: I just wanted to know whether this was a proper point.

A. Yes sir, that is market division sheep.

Exam. Carter: Yes.

Mr. Gladson: Off the record.

(Discussion off the record.)

The Witness: The columnal headings indicate the chute from which the animals are to be removed to holding pens [fol. 975] the block number or designation and the pen number in that block and the division number in which they are located are the other three columns for the purpose of identifying the holding pen to which they have been removed from that chute.

Form A-483 is the train book.

Form A-483 is distributed as follows:

1. Original copy direct to the auditor's office.

2. First yellow copy to District Agency.

3. Second yellow copy to file in receiving office for use.

Exam. Carter: Now, right at that point, what is the receiving office?

A. The receiving office, Mr. Examiner, is the centrally located office which I referred to the other day as the nerve center of the yards, and it is the office to which market agencies, dealers, government men, state and federal veterinarians, railroad employees, inspection bureau representatives, and any other parties interested in operations in the yards go with information as to directing the handling of their shipments or their animals or to obtain information concerning incoming shipments by rail or by truck or to give or receive information concerning the movements on various parts of the yard property. Even the packer employees will go there for giving or receiving certain information on their animals, whether they be purchased on the yards or moving in direct. In other words it can hardly be described as anything else except the center of all yard operations.

[fol. 976] Form A-483 contains a space for the following information: Engine number, railroad name, train number, platform, time in, time out, marks and date.

In the columnal headings you will find a space for consignor, state, consignee, car number, chute, block, pen, cattle, calves, hogs, sheep, dead and crips; The final column being

for the tag reference in the case of animals which may be tagged.

In making out form A-483, a shorter form (A-618) is inserted, and part of form A-483 information is carried by carbon on to it. This is known as the Train Record. It is posted in the receiving office, and this, together with the oral announcement serves as a notice to the consignees of live stock arriving for them.

The spaces in form A-618 contain information: Engine number, railroad number, train, platform and date. Then, in the columnal headings it has spaces provided for the consignor, state, consignee, car number and remarks.

It will be observed that the spaces on form A-618 and form A-483 exactly correspond as to the horizontal information, or the information in the horizontal spaces and in the columnal spaces as far over as the car number, there being no column headed: "Remarks", in the form A-483.

Meanwhile, the train conductor passes in to the receiving clerk at the receiving office the waybills on the cars brought in by him.

[fol. 977] The waybill was, of course, made out by the billing station at point of shipment. It is a railroad form and is uniformly the same on the various railroads. A copy of this is form JSA-5; this is the form used in billing out shipments from Chicago. It is used because it is the only copy available to us.

I perhaps should explain that we had no exact copy of the forms used at the various stations so we used the outbound form of Mr. Kemp because it is a uniform form used throughout the country.

Mr. Kemp: It is a mandatory form.

Mr. Gladson: There is certain printing on it that is not mandatory; isn't there?

The Witness: The waybill form which I have just referred to is a standard form originally adopted during the federal control of the railroads and contains space for information as follows:

At the top of the form is the name of the railroad and in the left hand columns spaces for this information:

"Stop this car at blank for blank; weight in tons gross, blank; net, blank: car initials and number; transferred to, blank, to blank station, blank state, route; (Show each junc-

tion and carrier in route order to destination of waybill. Indicate by check marks whether shipper's or agent's routing). Spaces: Shipper's routing, blank; Agent's routing, blank; Consignee's address (Final destination and [fol. 978] additional routing).

Time loaded, blank; date, blank; was an attendant in charge, yes or no, blank; was car bedded by carrier? Yes or no, blank; was bedding furnished by carrier and placed in car by shipper? (Yes or no), blank.

Amount of excess material furnished on shipper's written order, blank; was excess material placed in car by shipper, yes or no, blank; has 36 hour request been signed and filed at point of origin, yes or no, blank; government certificate number blank, attached; first, transfer or authority for diversion, blank; second, transfer or authority for diversion, blank. Then back to the top of the page and in the right hand column, state, blank, waybill number, blank from, blank station, blank state, number, blank; full name of shipper (Origin and date, original car, transfer freight bill and previous waybill references and routing when rebilled), blank.

Exam. Carter: Off the record.

(Discussion outside record.)

The Witness: The other spaces indicated on the form which I shall include in the set of exhibits to be filed are self-explanatory.

By Mr. Gladson:

Q. On that waybill it is printed: "U. S. Yards, Chicago, Illinois." That is not a standard part of the waybill?

A. Well, I passed that. In other words, I treated that as from blank station and blank state.

Mr. Gladson: All right.

[fol. 979] Exam. Carter: For the purpose of the record these forms which Mr. Heinemann is referring to in his testimony will be marked and received as Exhibit 32.

(Respondent's Exhibit 32, Witness Heinemann, received in evidence.)

The Witness: When this waybill is surrendered by the railroad conductor, it consists of an original and an attached carbon known as "Part 2, or Stub". After inspection by

the Bureau of Animal Industry representative, for information, these are sent to the District Agent.

I think Mr. Examiner and Mr. Kemp, it might be well to explain the derivation of that term, "Stub." For the period prior to the adoption of this uniform form, a live stock waybill was used which was rectangular in shape and at the right hand end of that waybill there was something resembling a check stub which contained, in brief, the information covered by the main body of the waybill. That had been known as the stub and in the formulation and adoption of the uniform live stock waybill, which is a part of this exhibit, the term, "Stub," was carried on to that, although it really is of the same size as the original waybill.

By Exam. Carter:

Q. And is merely a carbon copy?

A. And is merely a carbon copy, yes sir.

Concurrently with the waybill handling, the superintendent in charge of the receiving office makes an entry in a "Report of Unloading Live Stock Trains" (form A-265 [fol. 980] Revised). On this is entered a record of the platform used, the railroad bringing in the stock, engine number, time of day or night, time set at chutes, time of starting unloading, time unloaded, and the average time per car. This also provides for other information shown. This report is made in duplicate. The original is sent to the general superintendent's office where it remains as a permanent record. The carbon is retained at the receiving office for studies as to efficiency, etc. It is used frequently by railroad men.

The records showing the deads and cripples, if any, takes out of the car, tag number identifying them, which the yardmaster puts on them so that each owner's livestock identification is kept on the records, and the car number out of which they came, are held in our several warehouses for seven years. A specimen of this identification tag is shown. It has no form number, but is of metal.

After the livestock has been unloaded and the proper records made, it is then ready for delivery to the consignee or his representative. This representative of the consignee is required to be on what is known as the livestock delivery order. To get the representatives' names on the live stock delivery order, the responsible party of the consignee firm must sign a book in which there is a record of the name of

his employe or employes for whom he is responsible. He thus authorizes the Union Stock Yard & Transit Company of Chicago to deliver to and receive from them all livestock [fol. 981] received or ordered for shipment in their name. This book is a permanent record and a copy is not available for the case.

When these representatives call for the livestock, they are known to our men through a system of cards which are sent out to each scale and delivery man or keyman showing that they are entitled to receive livestock in the name of that consignee. The livestock is then delivered to the representative and receipted for in the deliver-man's book, having been counted by both the Yard Company and the consignee's representative.

This card report sent to the Yard Company representative is Form Aud. 328.

That form shows the order added, the name, order erased, so that the firm which should be shown there at the top may have names added, names deleted as time passes and as occasion arises.

By Mr. Gladson:

Q. Well, these are general orders rather than specific orders; are they not?

A. Oh yes, they are orders which are continuing to run until they are rescinded or changed.

Q. Or erased?

A. Yes, sir.

The receipt form is A-465. This is a book form calling for the information shown, and it is carried by the Yard Company employes who are charged with keeping proper delivery records. After the book is filled up, it is filed for permanent record at the receiving office.

[fol. 982] This record requires accuracy in recording and in receipting. That is why it is essential that delivery be made only to those duly authorized to accept delivery and to receipt therefor.

This particular form provides space in the horizontal space at the top for the date and the platform number, the train number and the marks and in the columnal heading, space for the commission firm, employee, chute, cattle, calves, hogs, sheep and cripples and at the bottom of the page a space showing: "Delivery by."

Exam. Carter: Now, when you refer to market division cattle, you mean cattle consigned to commission men; is that right?

A. Yes, as distinguished from the direct.

Q. The direct.

A. The market division cattle are next taken by commission men's employees over the viaducts accessible to the various commission men's cattle pens. The same procedure follows in the case of market division hogs, with the exception that the receiving platforms and chutes are located adjacent to the hog alleys.

In the case of market division sheep the records are made the same as for the other species except that, when the sheep are unloaded, the Stock Yard Company furnishes employees to send them to the sheep house with a ticket designating [fol. 983] the number of sheep unloaded from each car. This also includes the train number and platform. There they are received and receipted for by the consignee or, if during the night when the consignee is not present, they are yarding, and a record made of the yardage so that they are easily obtainable the next morning for the market.

When market division sheep are delivered by Yard Company employes, the record and receipt is on form A-496-RO.

This is a manilla card form containing information as follows: Platform number, blank; train number, blank; consignor, blank; consignee, blank; date, blank, and in the columnal space: Block, blank; pens, blank; number of sheep, blank; cripples, blank.

Q. Now, right at that point, Mr. Heinemann, let me ask you this: Except in the case of sheep and except in instances when the Commission men's employees are not available to drive the stock either from the unloading chutes—from the unloading chutes, the stock is ordinarily driven from those chutes by employees of the Commission men; is that true?

A. I don't believe that it is quite correct, Mr. Examiner, in this particular: If I understood your question correctly, you said, except when the Commission men's employees are available for removing them?

Q. Are not available?

A. Are not available, perhaps you meant and maybe I [fol. 984] misunderstood you, that, except where the Commission men's employees are available while the stock still is in the chute pen, if they are not available, and, for more

efficient operation we have to remove it to a holding pen, it there remains in that holding pen until they do come for it or send an authorized representative for it.

Q. Yes, I accept that modification; you are right about that. Now, as I understand it, the Stock Yards Company do not undertake generally to drive the live stock except with the exceptions which you have noted, to drive the live stock from the unloading chutes to pens, throughout the Yards; other pens throughout the Yards?

A. What we will call sales pens?

Q. Yes, sales pens.

A. Or market division pens.

Q. In other words, you do remove the stock from the chutes on various occasions to so-called holding pens?

A. Yes, sir.

Q. So that other stock may be brought into the unloading platforms and loaded into those pens?

A. Yes, sir.

Q. Except for that situation, you do not undertake or hold yourself out to yard the stock from the unloading chutes to Commission firm's pens or various other pens throughout the yards; is that right?

[fol. 985] A. That is true, as I have said, except as to sheep, and it might be well to give a little more explanation as to why we except sheep. Originally, under the construction of the Yards, we unloaded and yarded sheep directly from the cars into sales pens immediately adjacent thereto.

In sheep you have a species of animal entirely different from cattle and hogs. If we were to unload these sheep and attempt to yard them in pens suitable for yarding hogs or cattle, we would experience difficulty because of the inherent nature of the sheep and lambs. In other words, they could not accept yarding in these pens where there will be manure or refuse from other animals, without possible injury to them. If they were to try to lie down in those pens, their wool becomes contaminated and it would interfere with them being marketed in a good appearance, and, from the very beginning it was the custom to handle your sheep direct from the place where they were unloaded to pens which were equipped and suited for the yarding of sheep.

If deliver- is made to the Commission firm's pens at night, the next morning a receipt is taken on Form A-465, already

described. The animals are placed in pens and securely locked until the following morning.

That paragraph, of course, refers to sheep.

When consigned "direct", animals are driven by packers' representative over Union Stock Yard & Transit Com- [fol. 986] pany's property to killing pens.

(a) When unloaded for killing, scaled by packers' representative on packers' scales under Western Weighing & Inspection Bureau supervision and weights furnished carriers (Stock Yards District Agency) for computation of freight charges by Western Weighing & Inspection Bureau. Some shipments of sheep and cattle consigned to Armour and all directs billed to small packers are scaled on Union Stock Yard & Transit Company scales by Union Stock Yard & Transit Company's weighmasters.

On shipments of inbound horses, delivery may be made at two points, as follows:

1. At the Express Chutes where delivery is made by the River Road. This is near the Horse Market located south of the Amphitheatre.

I might add that unloading is from the track of the River Road.

2. Through our regular unloading facilities at any of the ten platforms.

A report on the horse market receipts is made daily. This is made on form H. M. 808.

Mr. Quasey: Mr. Examiner, if I may interrupt, as a matter of information at this time: You referred, Mr. Heinemann, to the River Road. I don't understand whether you explained what it meant by the River Road or not?

Exam. Carter: I think there is an explanation of that in the record. That is the Chicago Junction.

[fol. 987] The Witness: Lessee.

Exam. Carter: The Chicago Junction Railway, Chicago River, and Indiana Railway Company, lessee; is that it?

The Witness: Yes, sir.

Mr. Quasey: That is what you have been previously been referring to in the matter that the Examiner now refers to?

A. Mr. Quasey, you may not have been here but I explained that I, like most of the folks around the Stock Yards, am still living in the past so far as referring to this generally as the Junction, and wherever I refer to the Junction as doing this or that I ask that the record be understood to mean that I refer to the Chicago River and

Indiana Railroad as lessee of the Junction Railway Company's tracks and property located there.

Q. And that is what you referred to by the River Road?

A. Yes, sir.

Mr. Quasey: Thank you.

By Exam. Carter:

Q. Now, I just want to ask this additional question at this point: Then, is this true, generally speaking, with the exceptions that you have noted, that live stock unloaded at the unloading chutes is ordinarily driven by employees of Commission firms or by employees of the packers through the Yards to arrive either at the Commission firm's pens or at the points at which the packers desire their live stock to be taken; is that correct?

A. Yes sir, that is true. Perhaps I might state it in an-
[fol. 988] other way, that the Stock Yard Company does not hold itself out to remove this stock from either the chute pens or the holding pens to the market division pens or to the packer's slaughter plants or pens adjacent thereto.

There remains for description the collection of freight and other charges. Through an arrangement between the Union Stock Yards and the railroads bringing the stock to the Yards, the Yard Company undertakes collection of the charges.

Carriers (Stock Yards District Agency):

Waybills and live stock stubs received from the Union Stock Yard & Transit Company accompanied by copy of record mentioned paragraph 10, (Union Stock Yard & Transit Company form A-483).

Count of live stock transcribed from Union Stock & Transit Company form A-483 to live stock stub for proper rate classification, after which rate and other clerks apply proper rates and freight charges, using the minimum weight as basis.

Live stock stubs are delivered commission firms from which source, selling weights are obtained.

By Exam. Carter:

Q. You mean livestock stubs are delivered to commission firms; is that what you mean?

A. Yes, sir. I might add, Mr. Examiner, that the paragraph down until I shall designate the ending were those

taken from the memoranda prepared by Mr. Kemp and I will probably have to substitute pronouns in there where he speaks of: "Our", as referring to them as his employees. I am sure that he will accept that.

[fol. 989] Exam. Carter: All right.

The Witness: When such weights exceed the minimum on straight shipments, the commission firms extend the freight charges for the excess weight over the minima at the prevailing rate. When consignments consist of mixed species of live stock, the stub is returned to rate clerks with a statement of actual weights covering each species and a revision is made in accordance with information thus obtained.

All live stock stubs are picked up by Western Weighing & Inspection Bureau representatives, weights furnished verified by comparing with account sales, authorized fill allowances deducted and returned by Bureau representatives to carriers' office (Stock Yards District Agency).

Information contained on live stock stubs is revised and verified and then transcribed to waybills. Live stock stubs listed on form JSA-51-A and sent to Union Stock Yard & Transit Company to be used in collection of freight charges, accompanied by a summary which must balance with station waybill abstracts. Original waybills supported by proper abstract (Forms JSA-8 and 9) sent to interested auditor, constituting station debits. I will ask that these be attached with that other exhibit, Mr. Examiner, if that is agreeable to you?

Exam. Carter: Sure.

The Witness: First, I will hand out a copy of form JSA-8, those being the——

[fol. 990] Exam. Carter: Inasmuch as this is included in here, suppose we mark it separately?

The Witness: Oh, that is perfectly all right.

Exam. Carter: That will be marked and received as Exhibit No. 33.

(Respondent's Exhibit No. 33, Witness Heinemann, received in evidence.)

The Witness: I next offer copies of form JSA-9, which is the form of abstract used on interline waybills received.

Exam. Carter: That will be considered as a part of Exhibit No. 33.

The Witness: I now offer copies of form JSA-51-A, which is the form used for summarizing or recapitulation of the live stock collections.

Exam. Carter: That is in the same category. That will also be considered as part of Exhibit 33.

The Witness: The daily total of form JSA-51-A equals the accumulated total of forms JSA-8 and 9, the Union Stock Yard & Transit Company paying the total of JSA-51-A without alteration permitting a distribution of earnings without the usual detail, posting, reducing bookkeeping items to one per day per road instead of one item per car.

I believe my explanation the other day on the method of the collection of the freight charges will, in conjunction with [fol. 991] this, make it perfectly clear in the record. I don't believe I miss-stated it the other day, Mr. Kemp.

Live stock delivered to packers is handled in a manner similar to dead freight, bills being presented and collected in the usual manner and not thru the Union Stock Yard & Transit Company.

Corrections originating with auditors, shippers, consignees, agents and others are handled by the Rate, Accounting and Cashier forces of the District Agency of the line haul carriers direct without contact with the Union Stock Yard & Transit Company.

Union Stock Yard & Transit Company from A-483 is the basic report of operation and is carefully revised upon receipt by checking each waybill against same, insuring the receipt of a bill for each car received and in addition permits the District Agent to

(a) Check accuracy of River Road trackage bill.

(b) Check accuracy of Union Stock Yard & Transit Company's unloading bill.

(c) Furnish detail report of specific cars handled when requested.

I here take up further information concerning the stock Yard handling and forms at paragraph C, ending the operations in Mr. Kemp's office so far as these are concerned.

The yardage and insurance is listed on form 864 and is sent to each consignee each day. It consolidates on one or [fol. 992] more sheets all the cars received by each firm.

That form, Mr. Examiner, is included in the group of Stock Yards forms and constitutes, of course, notice to the consignee of the freight and other charges due from his firm on the shipments described therein.

Mr. Kemp: That is right. That is what constitutes the regular movement of the shippers.

The Witness: An individual bill is rendered against the consignee on each shipment on form 294. This calls for considerable detail as shown in the form. Before this can be filled out, a great deal of detail will have to be performed.

That form is likewise included in the group of Stock Yard forms and, as indicated therein, contains the detail as to the various charges for services covered by the Packers and Stock Yards tariffs filed with the Secretary of Agriculture, and, in addition thereto a detailed analysis and itemized list of the freight charges in the appropriate spaces therein.

For statistical purposes, there is made out in our Auditing Department a book record of all animals received and shipped. This information is also printed for distribution to those interested. This is not a numbered form. It shows the railroad receipts and shipments by railroad and by species, and also the total truck movement.

That form, although it is not a numbered form, is included by inserting a specimen copy for one day.

[fol. 993] Then, a monthly report similar to the daily report is printed and distributed. This is not a numbered form.

Again we have included a specimen copy of that for one month so as to show the exact information covered.

A report on monthly receipts of single deck and double deck cars is prepared and printed by the Auditor's Office from a book record kept daily.

This report is also consolidated into a yearly report covering the calendar year. It is not a numbered form.

A specimen copy of that particular form is included in the group of Stock Yard forms.

To give permanency to these statistical records, an annual year book is printed and distributed to railroads and others. This is not a numbered form.

There is also in the record a 1936 year book, and included in this book I used just whatever year happened to be handy because the form generally is the same in each of the recent years.

The records of the Stock Yard Company have identified each owner's live stock by waybills and car numbers, and they have now been delivered to a commission man for sale or to other consignees.

The Stock Yard Company renders its bill for unloading and loading monthly. It consists of a recapitulation showing each road and the amount due from each. It is accom-
[fol. 994] panied by a copy of the monthly receipts of single and double deck cars. This, with form A-483, enables the Agency office to check and verify for immediate payment.

That completes the description of the inbound shipment, Mr. Examiner.

By Exam. Carter:

Q. Now, this is not exactly apropos of that description, but yesterday when I was at the Stock Yards I noticed that, in some instances certain animals were consigned in particular portions of the car behind a barrier of some kind which appeared to have been constructed. Now, those barriers are removed by the Stock Yards employees; are they not?

A. Yes, sir.

Q. Is a charge assessed for that service by anybody?

A. Yes, sir.

Q. By whom?

A. Under our Packers and Stock Yards tariff as presently in effect there is a schedule in there covering the removal of these partitions. The charge is made by the Stock Yards Company against the live stock.

Q. That charge is not assessed nor is it published in any tariff of the trunk line railroad?

A. That is true.

Exam. Carter: That is all I have.

The Witness: I shall now give the description on the out-
[fol. 995] bound shipments.

After the Commission——

By Exam. Carter:

Q. Now, just one minute. That charge is not filed in any tariff on file with the Interstate Commerce Commission?

A. That is true.

After the commission man sells the livestock, he or his agent shown on the live stock delivery order take them to the scales, all of which are conveniently located. He calls to the weighmaster and then proceeds to weigh the stock to the purchaser. A balance of the scale is made after every five drafts. A record of each draft is made by the weigh-

master, showing by whom and to whom it was sold. The scale counter informs him of the number of animals driven off his scale.

This weight is recorded by registration through the medium of the registering beam type of scale. The imprint carries through four copies of our weight ticket. This scale ticket form is filled out by the weighmaster from information given to him by the parties to the transaction plus records inserted from his own operations.

These copies of the scale tickets are distributed as follows:

1. Original held for permanent record.
2. First carbon to the purchaser.
3. Second carbon to the seller as a "pay ticket".

[fol. 996] 4. Third carbon to the seller for his record.

Copies of these scale ticket forms have been included in the group of exhibits.

Under market practices, the seller's interest terminates when the animals are weighed to the buyer. Thereafter the buyer or his agent directs their disposition.

The animals are driven off the scales by the seller's representatives. As they leave the scale, they are carefully counted by Yard employes known as "Counter off" men.

A separate form is made for each species and each lot. The "Counter off" inserts the required information in the proper forms described as follows: Form 511, Revised, for Cattle and Calves. Form 513, Revised for Hogs. Form 510, for sheep.

Specimen copies of each of these forms have been included in the group of exhibits and I believe the information is quite clear as to the information to be used.

These are made with one original and two carbons. If the animals are for delivery to local buyers for use in the city, they receipt for them as they are removed from the scales.

If they are for shipment, the Yard Company's employes either yards them in a holding pen awaiting further instructions; or, if the instructions are complete, they move them to the shipping division.

All three of each of the three forms are handled as fol-

[fol. 997] lows:

1. Original held at scale where made until copies are returned.

2. Carbon and stiff copy move with the stock and are receipted by the yardmaster to whom delivery is made in the shipping division.

The receipts are then returned to the scale, matched with the original and all are held for permanent records.

The following detail is followed to insure correctness of the records.

After the counter-off completes his record, the animals may be yarded in a holding pen and locked up. When they are to be removed, a key man is called by the Shipping Division yardman and the animals are counted out of the pen by both men. Their count is checked against the counter-off ticket.

Upon arrival in the shipping division, the yardmaster, who is to receive them, and the yard man delivering them recount them and again check the number against the tickets.

The yardmaster at the Shipping Division either places the animals in the chute pens or yards them in pens adjacent to the chutes and enters the record of this in his book (form 938). This same record continues until the animals are finally loaded. This book is held by each yardmaster until filled and then is filed for a permanent record.

That book, form 938, is included in the group of exhibits [fol. 998] and I believe the spaces shown therein are self-explanatory.

By Exam. Carter:

Q. Is it correct to say this, that usually in connection with outbound shipments the live stock to be shipped is yarded by employees of the Yards Company to either the unloading pens or to pens convenient to the unloading pens?

A. That is true. They hold themselves out to do that as part of the Stock Yards service described in their Secretary of Agriculture tariff. When exceptions are made they are made at the option of the owner of the stock or his representative. He may, for his own reasons, desire to take them to the chute or to the chute pens or pens adjacent thereto.

Q. And he does actually do that sometimes, doesn't he?

A. That is true. For example, in the case of calves for shipment, frequently they may want to take them down there to the chutes and see that they are properly yarded down there, where they will rest comfortably until they are ready to be loaded into the car, they being a more or less delicate animal and they may want to be sure before they go home that they are safely on their way.

The receiving office, through the Union Stock Yard & Transit Company's superintendent of live stock, dispatches men to each individual scale as he is informed by telephone to take livestock from the pen in which it is yarded off the scale to the shipping division. Bulls and calves must be driven separately so as not to injure them.

[fol. 999] There are ten platforms, the hogs and sheep being loaded out on 1, 2, 3 and 4 platforms, while cattle are loaded out on 5, 6, 7, 8, 9 and 10 platforms. Each railroad is assigned a platform for convenience, but these are used interchangeable when necessary.

As I shall show later, those changes are not made at frequent intervals. I think Mr. Kemp will agree with that.

The potential shipper anticipating a shipment fills our a "live Stock Car Order" as early as is convenient to him. This is a railroad form known as JSA-43. Of course, it is not possible to supply the full information at the time the order is made out, but this is supplied later. This is placed with the District Agent in the Exchange Building.

The carrier line (Stock Yard District Agency) obtains orders in writing for the desired form JSA-43 and secures signatures to the live stock contracts, secures permission to extend time of consignment from 28 to 36 hours, form JSA-37. Mr. Examiner, I do not have a copy of that 36-hour release form but Mr. Kemp, I know, will be glad to supply them.

Exam. Carter: Yes, all right.

The Witness (Continuing): Secures all necessary permits from State and Federal Governments authorizing movements of shipments, orders necessary equipment properly prepared from carrier's classification yards, occasionally inspects cars for proper interior conditions, bedding, and so forth and arranges with the Union Stock Yard & Transit [fol. 1000] Company to provide the necessary requirements not previously furnished (bedding, feed, partitions, and so forth); supervises the loading as to any irregularities such as overloading, crowding, tying bulls and improper handling; and seals cars after loading. Waybills covering movements are prepared in advance in the usual manner, with the exception that car number, initials, time out loading, count and charges for other than ordinary services are omitted to be supplied by loading force after loading is com-

pleted; deliver waybills to conductor for movement of each car; check Chicago Junction track bill and Union Stock Yard & Transit Company loading bills with daily record, paragraph 17, Form 503. That last group of services as I introduced are those services performed by the carrier line (Stock Yard District Agent).

Q. Now, let me ask you this: These partitions you referred to partitions there, are they inserted in the cars for outbound shipments by whom?

A. By the Stock Yard Company employees.

Q. And you have a tariff on file with the Secretary of Agriculture?

A. Yes, sir.

Q. As to that service?

A. Yes, sir.

By two o'clock in the afternoon, the Car Orders are substantially all in the possession of the Stock Yards District [fol. 1001] Agency organization. For the convenience of all concerned, Stock Yards District Agency employes make a tabulation from the individual orders, which shows how cars for each trunk line are to be loaded, kind of stock which is to be loaded, destination thereof, and in fact all information except the loading chute at which cars are to be placed for loading and the number of head to be loaded.

The loading Foreman of the Union Stock Yard & Transit Company and the District Agency Car Order Clerk, after examining this tabulation, decide at which chutes the respective cars should be placed for loading and this information is then conveyed to the Road Haul Switching Foreman. This conference is held at approximately two o'clock each day and at the time the conference is held the outbound stock may already have been placed in the loading chute pens or it may merely be in the pens adjacent thereto, or it still may be at the scales being weighed or waiting to be weighed.

If the stock is not yet in the loading chute pens, the loading foreman of the Union Stock Yard & Transit Company will see that when the stock comes down from the scales or pens adjacent to the loading pens, it will be placed in the appropriate loading chute pens.

At the time of this conference between the Agency's Car Order Clerk and the Union Stock Yard & Transit Company's loading foreman, the Car Order Clerk may or may not know [fol. 1002] in what order in the train the cars which have

been ordered will be placed here at the loading chute pens and if the cars being brought in by a particular trunk line are not in the proper order in the train to permit them to be spotted at the right loading chute, the train may have to be switched and the arrangement of the cars changed, or they may be spotted as nearly as their order will permit at the proper loading chute and the animals moved out of one loading chute pen, through the alley into another loading chute pen. In the majority of instances, the cars are placed at certain loading chutes in accordance with the agreement between the Yard Company Foreman and the District Agency Car Order Clerk before the animals arrive at those loading chute pens and animals are then put in the chute pens opposite the cars into which the stock is to be loaded.

This car order is made with four copies. Three are retained by the railroad and the fourth is given to the party ordering the car.

That is car order form JSA-43, so it may not be confused with that intermediate language there.

The road haul line then arranges for the necessary cars and has these prepared for loading. They have control of the selection and assignment of cars for the outbound loading. By prearrangement, the customary docks are known to the rail haul carriers, and it also is known that certain species and certain shipments are generally loaded from [fol. 1003] about the same section of the shipping division.

The platforms, chutes, chute pens and all alleys, pens and yard facilities are the property of the yard company. They endeavor to assign these for the use of the various railroads loading over them in such a way as to best serve the interests of all concerned. The assignments are seldom changed. The allocation may be influenced by physical connection of the railroad, species of animals, volume via certain lines and other factors.

After stock is weighed and released, it is moved from the scales to the designated loading chute pens or holding pens adjacent to the proper platform by employes of the Yard Company.

A representative of the District Agent delivers to our yardmaster a "Loading List" on form 503, for permanent record.

The intended shipper gives us a stock shipping order (form A-502). This is signed by the shipper, who is generally the owner or the authorized representative of the

owner. This constitutes the authority to the stock yard company to effect delivery of the stock described therein to the designated railroad. This release is filed for permanent record after the loading has been completed.

When all sorting by shippers is completed, the cars assigned and any other preliminary attended to the animals [fol. 1004] are to be moved from their holding pens to the chutes. They are checked out of the holding pen by the yardmaster jointly with our assistant yardmaster.

By Exam. Carter:

Q. Now, when you refer to the yardmaster there, you refer to your yardmaster?

A. Yes, sir. And I believe later on here that I make definitely that explanation so we will not be confused.

Their count is then checked against the yardmaster's book record. This movement brings them to the chute pens.

On arrival at the chutes where the cars are spotted, a recount is made as a final check against errors. This is by the same man.

With the animals in a pen immediately adjacent to the designated car, a member of the crew puts in the bridge and holder and makes certain it is firmly in place. The animals are driven up the chute across the platform and bridge and into the cars.

If bulls are to be loaded, they are securely tied to the side of the car to prevent injury to other animals or to each other.

Calves, because of their immaturity, are handled with extreme care to prevent injury to them. Cattle and hogs are more sturdy and mature and may be handled with greater ease, although hogs are slower moving.

Frequently changed plans of the shipper require that [fol. 1005] shipments be held over night or for several days. This may be done in pens adjacent to the chutes.

A report is made by each platform foreman showing the information required in form A-621. This is known as a "Platform Report" and is made in triplicate. It is distributed as follows:

1. Original to the General Superintendent for operation check.

2. Copy to the Auditor's office for accounting check.

3. Copy to the Receiving office for permanent record.

Now, in each of those three cases I refer to Stock Yard Company employees.

After the physical loading is completed, a report is made out showing the time the cars were set, the platform, the railroad, the number of cars in each train, and the species, and also the completed time of loading and the time the train pulled out, with any remarks or explanations concerning any delays or irregularities. This is form R. O. 485. This is made in triplicate. It is given the following distribution:

1. Original to General Superintendent for operation checking.

2. Copy to Auditor's office for accounting and statistical work.

3. Copy to Receiving office for permanent record.

Another record is made in duplicate showing the record of [fol. 1006] shipments for that particular day—one copy goes to our auditor and one to the Bureau of Agricultural Economics of the U. S. Department of Agriculture, at Administration Building. This is form A-939.

A report of shipments on form A-220 is made daily at the close of the business day, which, for this purpose, ends at 3:00 P. M. This is in triplicate. It is distributed as follows:

1. Original copy to General Superintendent for operation observation.

2. One copy to auditor's office for accounting and statistical work.

3. One copy to receiving office for permanent record.

Where it is necessary that charges of the Yard Company be billed out as "advanced charges" by the road haul line, the details of these are set out in form A-482, known as "Follow Charges" form and delivered to the District Agent.

The amount therein is entered in the shipping contract (form 249) and also waybilled. The uniform live stock contract is filled out and signed by the road haul line and the shipper or his agent. (form 249)

The loading out of horses both at the private sales and at the auction sales is done at the same track, unless otherwise ordered. These horses are led by the halter, one man to a horse.

Lest there be some confusion in the names of our various [fol. 1007] classes of employes, mentioned by me, let us go into a little more detail.

"Yardmasters" have nothing to do with train yards or train operations but their work with us is in yard operations, and in a supervisory capacity as distinguished from regular crews. There are 25 yardmasters and assistant "Superintendents," who, likewise, have nothing to do with the operation of trains, but they have supervision over their respective divisions. There are 14 of these superintendents. "Weighmasters" have nothing to do with track scaling, but do weigh live stock on the hoof. There are 28 weighmasters at present.

"Keymen" have nothing to do with train dispatching or telegraphing. These men are custodians of the keys used in unlocking our facility locks in the yards. There are 39 of these men.

Yardmen are not switchmen but are employes skilled in handling live stock. Their number varies.

Now, that, Mr. Examiner completes it, and if I have interpolated anything not clear to Mr. Kemp, I should be glad to know it.

Mr. Kemp: No, there is nothing interpolated out of line, Mr. Examiner. There is only one remark that I care to make, and that is on the inbound movement, in describing the actual conditions in unloading, where reference is made to the weather conditions that call for greater care and a [fol. 1008] greater amount of force, I do not think, and neither do I think that Mr. Heinemann thinks that is true as to shipments in that kind of weather but it may happen and does happen on some shipments.

The Witness: I accept that statement.

By Exam. Carter:

Q. Now, let me ask you, Mr. Heinemann, this question: I don't know whether you have or not, but have you ever made any investigation for any particular period to determine the per cent of the incoming live stock shipments which are moved from the unloading pens by employees of the Commission firms or employees of the packers?

A. Mr. Examiner, I should prefer to have Mr. Henkle say that because he has been there a long time and I have had nothing to do with any such test. He may have had.

Mr. Henkle: I did not hear all of the question.

Exam. Carter: I can ask you later, Mr. Henkle.

Mr. Henkle: All right.

Exam. Carter: All right. Are there any questions that anybody desires to ask this witness?

Mr. Quasey: I have just a few, Mr. Examiner.

Cross-examination.

By Mr. Quasey:

Q. Mr. Heinemann, what notice, in addition to the posting of the arrival sheets in what you call the chute house, is given to the consignee?

A. Oral notice from the so-called pulpit in what I call the receiving office. You refer to the chute house. I assume [fol. 1009] you refer to what I call the receiving office.

Q. The receiving office, all right?

A. Of course, Mr. Quasey, there is on each of the platforms a place where copies of the unloading foreman's report is posted, which would be more clearly what I would call a chute house. A copy is retained there so that it would give more detail.

Q. But it is primarily up to the consignee to find out whether he has got anything in?

A. Well, they follow a custom that has been established there long before you and I were born, of coming to that central location for the information. I would hardly say that it is up to the consignee. I think he is just following the accepted practice just as in some cases the railroad gives the information by telephone advice.

Q. But you don't know whether that is done in this instance?

A. It is not done. There is no telephone in fact, except in rare instances. There may be a specific occasion, for example, where you people might ask that we telephone you when the stuff was in sight, and they make an exception, but that is not undertaken as a general proposition.

Q. I don't know whether this next question is particularly material, Mr. Examiner, but I would like to inquire whether any part of the yards is closed at this time for use in connection with sales of live stock?

[fol. 1010] Mr. Gladson: Oh, Mr. Examiner, it seems to me that that is not material.

Exam. Carter: I don't know that that would—it doesn't make any difference.

Mr. Quasey: Well, as I say, if it is agreeable, we will just consider the question stricken.

Exam. Carter: There are parts of the yards that are, in fact, closed at this time, aren't there? I mean, that are not being used?

A. Not being used, certainly, for use in the general sales operations. They may be used for yarding outbound stock or something of the sort, or receiving inbound stock.

Q. They would be used if you had enough stock coming in to use them; wouldn't they?

A. Gladly.

By Mr. Quasey:

Q. Is all of the live stock consigned to packers driven off the premises of the Stock Yard Company by their men?

A. There are some few consignments which are removed by vehicle, but, as a general proposition, and I think your question goes to that——

Q. Yes.

A. The packer's employee removes the stock from the premises in all cases.

Q. Yes. In connection with the delivery of sheep by the Stock Yard Company employees, Mr. Heinemann, you ex- [fol. 1011] plained the reason why the sheep were not yarded in pens that were previously occupied by other classes o animals. If the yard company did not drive the sheep and lambs to the sales pens assigned to Commission companys, it would probably be necessary to expand the facilities for that purpose?

A. Perhaps if you will substitute for the word: "Expand," prepare facilities, I think that is true, Mr. Quasey; they would have to have facilities suitable for sheep.

Q. In all instances where you referred to time, you indicated by that to be Standard Time?

A. No, I don't think I have, in that sense. I have referred to spaces where time is inserted and, of course, if we happen to be on Daylight Savings, that time will be used.

Q. Well, I just wanted to clear that because you did not designate whether it was Standard or Daylight Savings Time, but I recall in your testimony that you referred to outbound shipments?

A. Yes, sir.

Q. At two o'clock?

A. Well, I will say that wherever I referred to the time, I referred to the prevailing time in the City of Chicago because, as I explained the other day, we do not operate under the time zone restrictions of the Commission.

Mr. Quasey: All right.

Exam. Carter: That is all.

[fol. 1012] Mr. Quasey: Yes.

Exam. Carter: Any other questions?

(No response.)

Exam. Carter: Have you any questions?

Mr. Gladson: No.

Exam. Carter: That will be all, Mr. Heinemann.

(Witness excused.)

Exam. Carter: Mr. Henkle, have you made any investigation at any time for any period to determine the percentage of live stock, incoming live stock shipments driven from the unloading pens by the employees of the packers or Commission men, as distinguished from those driven by employees of the Stock Yard Company?

Mr. Henkle: I do not recall any such test.

Exam. Carter: All right, thank you. The reason that I mentioned that, gentlemen, is that yesterday, in conversation which everybody heard yesterday, it appeared that possibly some investigation had been made by employees of the trunk line agency. Is that correct, Mr. Kemp?

Mr. Kemp: About the——

Exam. Carter: About the percentage?

Mr. Kemp: I think that the Western Weighing & Inspection Bureau made a study for a month, Mr. Examiner.

Mr. Gladson: Mr. Examiner, I am at loss—I am a little at a loss to understand just what that has to do with the [fol. 1013] question of whether or not the Stock Yard Company is a common carrier.

Exam. Carter: Well, I am trying to develop all of the facts that I can with respect to the conditions existing at the Union Stock Yards in Chicago because it is my theory that we have got to make our determination of the status of that company on the conditions there existing and Mr. Heinemann has already testified this morning that usually

the yarding is done by the employees of the Commission firms and by employees of the packers and, of course, he gave certain exceptions in which that does not happen. Now, if we have a study for any representative period which shows that condition, checks up with that condition, I would like to have the benefit of it. This is, I don't know just what investigation Mr. Hoffman has made but I do understand that he made some investigation for one month. Mr. Hoffman, would you mind coming up here and telling us what you did?

F. F. HOFFMAN, was sworn and testified as follows:

Direct examination.

By Exam. Carter:

Q. Will you give us your name and your occupation?

A. F. F. Hoffman, Live Stock Agent of the Western Weighing & Inspection Bureau, U. S. Yards, Chicago.

Q. You have acted in that capacity for some time?

[fol. 1014] A. Since 1919. Prior to that I was Chief Clerk to the Live Stock Agent. I entered the service of the Western Weighing Bureau in the year of 1919.

Q. Will you describe what sort of an investigation you made to determine the percentage on inbound shipments of live stock, yarded by employees of the Commission firms and of the packers? Is that what you did?

A. No, that is not what I done, Mr. Examiner.

Q. Will you explain what you did?

A. Yes. I took the train sheets for the month of January, 1937, and counted off of those train sheets 8,769 cars, which I have every reason to believe was the total number of cars received at the U. S. Yards, for that particular month, and of those 8,769 cars we counted where the delivery was taken by the consignee at the unloading chutes and this number totaled, 6,923 cars or 78 per cent of the total cars counted, which was, 8,769.

Mr. Gladson: Now, I thought he was going to tell us just what he did.

The Witness: No.

Mr. Gladson: I want to interpose an objection to this testimony as not germane to the issues in this case and inso-

far as he has already given testimony of that nature I move that it be stricken.

Exam. Carter: Well, I will admit the testimony because [fol. 1015] I asked for it, subject to your objection. Now, your objection is that the testimony is not material to the issues.

Mr. Gladson: It seems to me that it is not material.

Exam. Carter: Any questions?

Cross-examination.

By Mr. Gladson:

Q. Where did you get the information as to the shipments that were driven away from the chutes?

A. Driven away?

Q. Yes, sir.

A. You mean the delivery of the 6,923, Mr. Gladson?

Q. Yes.

A. From the train sheet. It shows delivery opposite the car number; it shows delivery.

Q. What do you mean by train sheet?

A. The train sheet? That is prepared by the Union Stock Yard and Transit Company; a copy of which goes to Mr. Kemp's office, and that is the train sheet which we use.

Q. That is a Stock Yards record?

A. That is a Stock Yards record, a copy of which goes to Mr. Kemp. That is what is known as the train sheet.

Q. Have you the details of that study, Mr. Hoffman?

A. Well, not all of it, no. I have just got the recap here.

Q. You haven't the details?

A. No, I haven't the details; just the recap.

Exam. Carter: I will state that it is not my understanding [fol. 1016] that Mr. Hoffman made that study for the purpose of this case in any way; it just happened.

A. It just so happened, Mr. Gladson, that I took those train sheets and ran over those. I do that. I do a lot of things out there, possibly.

By Mr. Gladson:

Q. Just a little pastime?

A. Well, it is not a pastime because we have plenty to do out there.

Exam. Carter: I just want to make it clear on the record that, so far as I know, I understand that this study was not made for this case or for this record and it just happened that the figure of 78 per cent was mentioned yesterday in the conversation, at which representatives of both the Yards Company and the railroads were present, and I asked Mr. Hoffman to come down here and tell us how he arrived at that figure.

Mr. Gladson: Of course, we did not accept at the conference the other day, the accuracy of those figures.

Exam. Carter: No, that is perfectly true. Mr. Heinemann did not accept the accuracy of those figures.

The Witness: That is right.

By Mr. Gladson:

Q. What month does this purport to cover?

A. January, 1937, this last report.

Q. January is ordinarily a month of bad weather; isn't it?

A. Yes sir, it is.

Q. And the trains are quite likely to be late during the [fol. 1017] month of January?

A. Yes sir, you are right.

Q. And in the event that the trains are late there won't be the same occasion for the yarding of stock from the chute pens into the holding pens as when the trains arrive on time, will there?

A. No, you are right there to-, Mr. Gladson. You see, this—I didn't take any——

Q. Just a minute. I have asked all the questions I want.

A. I want to make myself clear, Mr. Gladson. I did not take any particular month as to weather conditions or anything. I believe that I made this in February and January happened to be the month prior to my investigation and that is how I picked out January. If I had made that study in July, I may have picked out June.

Exam. Carter: Any other questions?

Mr. Quasey: Mr. Examiner, yes.

By Mr. Quasey:

Q. Mr. Hoffman, was the month of January this year one of unusually severe weather or moderate winter weather?

Mr. Gladson: Oh, I object. I don't think he is a weather expert.

A. Well, without consulting the weather bureau, or what have you, I wouldn't say yes or no on that.

By Mr. Quasey:

Q. Well, whether there were—were there any unusual train delays during that month on account of weather conditions?

[fol. 1018] Mr. Gladson: Oh, I object to that.

A. I can't answer that.

Exam. Carter: This wasn't offered as a representative showing. It was offered simply as the result of this study that he made of the month of January. Any other questions?

Mr. Quasey: I have one more question, Mr. Examiner.

By Mr. Quasey:

Q. Were the receipts in January unusually large?

Mr. Gladson: I object to that.

By Mr. Quasey:

Q. (Continuing.) For the winter period?

Mr. Gladson: As calling for a conclusion.

Exam. Carter: I will sustain the objection. That does call for a conclusion.

Mr. Quasey: All right, I believe that is all.

Exam. Carter: That will be all, Mr. Hoffman.

(Witness excused.)

Mr. Quasey: Mr. Examiner, I have not been able to determine whether or not the Packer and Stock Yards Act of 1921 has been made a part of the record in this case and I appreciate the circumstances under which this hearing is conducted today and I just merely request the Examiner's permission to introduce B. A. I. Order 357 which contains the Packer and Stock Yard Act as amended in 1926 and 1935, as an exhibit in this case.

Mr. Gladson: Well, Mr. Examiner, it is a perfectly useless procedure. I think, if Mr. Quasey has not forgotten since he studied the subject, that the Commission takes [fols. 1019-1021] judicial notice of the statutes of the United States.

Exam. Carter: The parties will be permitted to refer to that statute.

Mr. Quasey: Very well, then, it can be made a part of the record by reference.

Exam. Carter: Yes. Is there anything further, gentlemen, before we close?

Mr. Gladson: No, except that I want to renew my exception to closing the record at this time. That was previously made.

Exam. Carter: Yes, all right, that will be noted. Then, this hearing is closed.

(Whereupon, at 11:40 o'clock A. M., June 16, 1937, the hearing was closed.)

[fol. 1022] INTERSTATE COMMERCE COMMISSION

Chicago Junction Case

Finance Docket No. 1165

Application of the New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock or Property

Submitted April 5, 1922. Decided May 16, 1922

1. Acquisition by the New York Central Railroad Company of control of the Chicago River & Indiana Railroad Company, by the purchase of its capital stock, approved and authorized subject to certain conditions.

2. Acquisition by the Chicago River & Indiana Railroad Company of control of the Chicago Junction Railway, by lease, approved and authorized subject to certain conditions.

3. Application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company denied without prejudice to future proceedings.

Robert J. Cary and Sidney C. Murray for applicant.

Silas H. Strawn and Frederick C. Hack for Chicago Junction Railway Company and Chicago River & Indiana Railroad Company.

Luther M. Walter for intervening carriers.

Irving Herriott, Butler, Lamb, Foster & Pope, and E. S. Ballard for certain interveners.

C. G. Austin, Jr., for Belt Railway Company; and Walter L. Fisher for Chicago Railway Terminal Commission.

Report of the Commission

By the Commission:

The New York Central Railroad Company, hereinafter termed the Central, a carrier by railroad subject to the interstate commerce act, on December 28, 1920, filed its application for approval of the following proposed transactions:

(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity.

(c) The granting to the Central by the Junction of an option to purchase all of the capital stock of the latter or all of the properties to be leased as last above set forth.

The application recites that it is filed pursuant to the provisions of paragraphs (18) to (22), inclusive, section 1, [fol. 1023] and of paragraph (2), section 5, of the interstate commerce act. No representations were made my any State authority for or against the granting of the application. Public hearings were held at Chicago and at Washington and all interested parties were given opportunity to be heard. At the opening of the hearing, interventions in opposition to the application were filed by the following trunk lines entering Chicago from the east and southeast: Baltimore & Ohio Railroad Company; Chesapeake & Ohio Railway Company; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; Pennsylvania Railroad Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and Wabash Railway Company. Two groups of shippers also intervened, one in opposition to the application and the other taking a neutral position. In addition there were

filed separate written indorsements of individual corporations and firms, comprising about 90 per cent of the 400 shippers served by the Junction and the River Road, urging our approval of the proposed plan. About 30 of these indorsements were subsequently withdrawn. The Chicago Railway Terminal Commission was also represented during a portion of the hearings.

The record, which is voluminous, established the following facts: The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the central manufacturing district and the stockyards group. The other three comprise the sections north from the stockyards to Fifteenth Street, east to Lake Michigan and southwest to Central Park Avenue, respectively, including what is known as the Kenwood manufacturing district. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at Forty-ninth and Oakley Streets and again with the latter line at Forty-ninth and Morgan Streets. The other eastern trunk lines, intervening in this proceeding and competing with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad, and the Illinois & Northern Railroad comprise the only in- [fol. 1024] dependently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the 23 trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which operated the property up to 1887, all of the trunk lines entering the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer asso-

ciation controlled by the carriers. The stockyards company resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Railroad Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Railroad Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central manufacturing district, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-than-carload freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound, the line-haul carrier places its loads in the Junction yards at Ashland Avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its Forty-ninth Street classification yards, then taken out and classified for destination by the line-haul carriers, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound less-than-carload shipments the Junction maintains a union freight station at Fifteenth Street and Western Avenue, where any number of packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and delivered to the proper track in the classification yards as in the case of carload freight. A trap-car service is also maintained. Dressed meats from Packingtown are han-

[fol. 1025] dled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or less-than-carload, and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the past have not been such as to permit the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team-track facilities.

The position of the Central and the grounds upon which it relies for the support of its application may be summarized as follows:

The Central lines are vitally in need of additional downtown terminals in Chicago, which it can not now build up for itself because of the preemption of real estate and the high level of land values, rendering the cost of new construction prohibitive. A terminal property must necessarily be constructed before, and not after, an industrial development takes place. The Junction and River Road properties have a strategic location which can not now be duplicated, and could not be reproduced at any price. To bring under a common control these properties and the Harbor Belt would greatly promote the public interest by providing the necessary "balance" between the inner industrial movement afforded by the former and the transfer, interchange, and classification facilities available and potential on the rails of the latter. The Junction properties are incapable of expansion so as to afford adequate facilities for interchange and classification, since the district in

which they lie is highly developed and intensively used, whereas the Harbor Belt has or can acquire additional space for the building of yards. The inner and outer properties are therefore complementary and in no sense competitive, but can only be operated to the best advantage by bringing them under common control. This expansion at outlying points would permit the inner group to extend further its [fol. 1026] team-track facilities and enable a more expeditious use of the less-than-carload facilities of the stockyards group. The gain to shippers on the Junction would be found in the greater accessibility of the outer-belt facilities of the Harbor Belt and the expansion of inner facilities made possible by the removal of outer-belt facilities from the inner district. Inbound traffic, for example, would be brought first to outer classification yards on the Harbor Belt and there made up into trains for the 12 districts served by the inner lines. Other services now performed by the Junction in the congested area would be performed on the outer belt, to the great relief of the present Junction facilities.

The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the transportation act, 1920, was designed, as evidenced by paragraph (4) section 3 of the interstate commerce act, as amended; that the live-stock market requires open operation of the facilities serving the stockyards, and the shippers in the district must have competitive service by neutral terminals; that the car supply for the district can not and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates; and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They offer to combine with the Central in a joint control of the properties on the basis of their fair value.

The group of shippers intervening in opposition express the belief that they will not, under the proposed plan, con-

tinue to enjoy existing routing privileges or receive equal service from all trunk lines entering Chicago, but will be forced to route over the Central as a matter of self-protection.

The second group of intervening shippers are desirous of preserving intact the present organization of the Junction and the same impartial service which they now enjoy and desire that the Central bind itself to accept certain conditions designed to insure that result.

The Chicago Railway Terminal Commission fears that the project may prove deterrent to the adoption of the city's plan, not yet formulated, for the unification and coordination of all Chicago terminals, the establishment of universal freight stations, and other measures which may hereafter be adopted to relieve congestion in the downtown shipping [fol. 1027] district, and would prefer to have the Junction and River Road properties remain neutral pending the outcome of its investigations and the adoption, by legislation or otherwise, of a comprehensive policy.

As to values, the Central offered proofs tending to show that the present cost of reproduction of the River Road properties exceeds $3,000,000. Deducting the funded unmatured debt of $891,428.57 as of the date of the application, would leave an equity, it is asserted, of more than $2,000,000, represented by the capital stock of the par value of $500,000, for which the Central proposes to pay $750,000. Further proofs tend to show a present cost of reproduction for the Junction properties, including the value of its leases, of considerably more than $33,000,000, represented in the proposed plan by the capitalization at 6 per cent of the $2,000,000 rental.

Estimates were introduced showing separately the cost of reproduction and cost less depreciation of road and equipment and the land values of the properties. Reproduction cost new was obtained by applying to the several quantities, as per inventory of the bureau of valuation, an average price for the year 1914, and applying thereto a multiple averaging 2.26 times the 1914 price, to obtain the cost new as of 1920. To these results were added normal percentages for engineering, general expenditures, and interest during construction, and depreciation was applied to the whole in accordance with methods approved by the bureau of valuation. Adding structural going-concern value, materials and supplies, and working capital, a grand

total of over $18,000,000 was obtained as the value of the Junction road and equipment, except land, and the corresponding figure for the River Road was, by the same methods, placed at over $2,000,000. An elaborate study of land value was presented and analyzed at some length by experts in Chicago real-estate values, the conclusion being that the lands of the Junction are valued in excess of $23,000,000 and those of the River Road at over $1,500,000. Further opinion evidence was given as to the commercial or market value of the properties from the standpoint of the Central and the additional worth of such properties to it because of the uses to which they can be devoted in developing the Central's traffic, the contention being that the value of the properties to the Central is greatly in excess of that value which may be assigned to them for rate-making purposes.

It appears that the investment cost of the Junction property is impossible of accurate statement, because no proper accounts were set up until 1905, and since that time, it is stated, various important items have failed to find their way into the investment in road and equipment on the company's books. The investment reported by the Junction in [fol. 1028] 1920 for the purposes of the Advanced Rate case (Ex parte 74) was slightly in excess of $6,000,000. There is also evidence that the Junction officials as late as 1919 considered it proper to claim a value for rate-making purposes of something over $17,500,000. Our bureau of valuation has not yet completed its tentative report on the properties pursuant to section 19a of the act.

Under all the circumstances it is not feasible to make a definite finding of value in this proceeding which shall be taken and accepted as a final judgment in the matter, and the conclusion herein reached renders such a finding unnecessary.

On all the facts of record it is concluded that for the purpose of this proceeding only we may accept the position of the Central that the market value of the properties to the Central and its affiliated companies at this time is such as to justify the payment of a rental based on something more than the value for capitalization or rate-making purposes. That is by no means saying, however, that its figures are to be accepted as the basis for permanent capitalization or for rate making, or that the Central is to be permitted to capitalize the intangible values by paying, through the

River Road, permanent fixed charges on the basis of the market value claimed. Since the values are not at this time capable of definite settlement, it follows that such part of the application as relates to the purchase of the capital stock or the physical properties of the Junction will not be granted herein, but will be reserved for future treatment at such time as the Central may desire to renew its application in that respect, following the final determination of values under section 19a of the act.

It remains to discuss the disposition which should be made of those portions of the application which relate to the acquisition of the capital stock of the River Road by the Central and the proposed lease to the former of the properties of the Junction.

There are grave objections to an unconditional approval of the plan under consideration. Much testimony was adduced at the hearings, and divergent opinions were expressed, as to the relative merits of cooperative, singly controlled, and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect to the general terminal situation have not yet fully developed, and it is obviously impossible for any one to determine at this time the ultimate goal which ought to be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the [fol. 1029] Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. It has been held that where

such a transaction as the present one would clearly facilitate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not controlling. People ex rel. New York Central R. R. Co. v. Public Service Commission, 183 N. Y. S., 930.

There are in the record ample grounds for the belief that the Junction can no longer solve its problems without outside assistance. On the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan. A prime factor in the situation is the circumstance that the general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective of the ownership or control of a given terminal property by a single trunk line or by a group of trunk lines. Traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor. Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end.

[fol. 1030] But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions. Those conditions relate partly to the method of operation of the property and partly to the treatment of the transaction by the corporations participating therein. Among the number are those matters enumerated by the shippers who have asked an approval of the plan with the understanding

that certain agreements already made by the Central will be adhered to. Other matters were suggested by the group of shippers who took a neutral attitude at the hearing, such matters being agreed to on the record by the applicant; and still others suggest themselves from the standpoint of an administrative body, as necessary in order to safeguard the public interest in the future. Stated concretely, the conditions are:

1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges, the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car-service regulations, cars made empty on the rails of the Junction and River Road shall be available for outbound loading in the same manner and to the same extent as at present, irrespective of routing.

6. Whenever additional cars are required for outbound loading, because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by [fol. 1031] it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the

shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all inbound and outbound cars irrespective of what carrier or carriers may be interested in the line haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting-line switching charges than that which prevail in the Chicago switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

11. Present trap-car arrangements for the transfer of less-than-carload freight at the Junction union station, at connecting-line freight stations, or at connecting points reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap-car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arrangements at the Junction union freight station, so far as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound less-than-carload freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk-line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, [fol. 1032] shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the city of Chicago, by us, or by any other public agency, for unified or coordinated terminals, and neither the Central, the River Road, nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for opposition to such plan or plans of said city, our plans, or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of section 15a or section 20a of the act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose.

Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

An order will be issued in accordance with the foregoing.

DANIELS, Commissioner, concurring:

I concur in the result reached in this report. I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under section 1, paragraph 18, of the act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.

I am authorized to state that Commissioner Campbell concurs in the views expressed above.

HALL, Commissioner, concurring in part:

If the powers of Congress are not adequate to deal with such a terminal situation as will result under the authorization here given, then they are not adequate to deal with the terminal situations which exist to-day in Chicago and many another city. The Pennsylvania, the Baltimore & Ohio, the North Western, for example, already have what the New York Central seeks in the way of lodgment, and, if it could [fol. 1033] not be dislodged, neither can they. If the powers of Congress are adequate, but those granted to this commission as its agency are not, additional grant will be needed to meet existing conditions quite as much as to meet those which would result from the proposed acquisition.

No solution of the Chicago terminal problem can be suggested which will not have to take into account the existing terminals of the 23 line-haul carriers serving that city as well as "independent" terminals like the Junction. Seven of the 23, competitors of the New York Central, are marshaled in opposition to what it seeks, but ready to join it in the acquisition and leave out the rest of the 23. The "neutrality" of the Junction will not be changed in respect of live stock, which constitutes about 35 per cent of its traffic. That has long been moved by each line-haul carrier to and from the stockyards over the Junction's rails and, as appears in the majority report, "all parties concede that that is the only practical method of handling that traffic." Acquisition by the New York Central may ultimately facilitate rather than impede solution by more nearly equalizing the respective contributions of the line-haul carriers to the looked-for "joint and cooperative terminal."

The facts warrant grant of authority without elaboration of conditions. Those imposed in the majority report seem to me vain, perhaps harmful, except Nos. 15 and 16, which should suffice if any are needed. I refrain from discussing the points of law. They will doubtless be settled by competent authority when occasion arises.

MEYER, Commissioner, dissenting:

The Chicago Junction Railway and Chicago River & Indiana Railroad are now open terminals. According to the uncontradicted testimony the Junction is the best type of open terminal to be found anywhere in the United States. What the majority approves in this report may in the future

restrict the use of and close these terminals to competitors on equal terms. That is why I can not concur in the report. To be sure there are conditions in the order the intended purpose of which is to prevent the imposition of restrictive features in the use of the Junction Railway. I am not satisfied that those conditions can be adequately enforced, or that their enforcement, because of the necessary inflexibility when they are imposed as conditions, will not unduly hamper operations within the terminal.

The future of our railroads and the character of their service to the public depend largely upon the manner in which terminals will be used. For many years cases involving the use of terminal properties by competitive railroads have been before us. The one insuperable obstacle to the [fol. 1034] free use of terminals as reflected in these cases has been the insistence on the part of the owning carriers upon their technical legal rights, as a result of which much injustice has been done to individual shippers and the free development of industry hampered. Railroad companies seem to take the view that the public use of terminal properties is more limited than the use of their other properties devoted to the public service. The familiar distinctions between and differences in treatment of competitive and noncompetitive traffic, short-hauling, and other considerations, have been invoked in order to defeat what in my judgment the commerce of this country clearly requires. My personal views regarding certain features of terminal situations are perhaps more fully reflected in our report in the Peoria & Pekin Union case, 26 I. C. C., 226, than in some of the other terminal cases, and need not be restated here. Among the leading cases on this subject the following may be mentioned: Associated Jobbers of Los Angeles v. A., T. & S. F. Ry. Co., 18 I. C. C., 310, April 5, 1910; Manufacturers Ry. Co. v. St. L., I. M. & S. Ry. Co., 21 I. C. C., 304, June 21, 1911; Merchants & Manufacturers Asso. v. P. R. R., 23 I. C. C., 474, May 14, 1912; Morris Iron Co. v. B. & O. R. R. Co., 26 I. C. C., 240, December 2, 1912; St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C., 226, February 10, 1913; Manufacturers Railway Co. v. St. L., I. M. & S. Ry. Co., 28 I. C. C., 93, June 21, 1913; Buffalo, Rochester & Pittsburgh Ry. v. Pennsylvania Co., 29 I. C. C., 114, December 3, 1913; Waverly Oil Works Co. v. P. R. R. Co., 28 I. C. C., 621, December 3, 1913; Traffic Bureau of Nashville, Tenn., v. L. & N. R. R. Co., 28 I. C. C., 533, December 9,

1913; Manufacturers Railway Co. v. St. L., I. M. & S. Ry. Co., 32 I. C. C., 100, July 10, 1914; City of Nashville v. L. & N. R. R. Co., 33 I. C. C., 76, February 1, 1915; Louisville Board of Trade v. L. & N. R. R. Co., 40 I. C. C., 679, July 5, 1916; Richmond Chamber of Commerce v. S. A. L. Ry., 44 I. C. C., 455, April 28, 1917; The New York Harbor case, 47 I. C. C., 643, December 17, 1917.

In the instant case the New York Central management has manifested a commendable departure from the old theories of restrictive and selfish use of railroad terminals by their owners, but although the applicants have agreed to conditions which, if made effective, would prevent in large part the ancient evils, there is and can be no adequate guaranty that through the imposition of switching charges, car supply, hours of interchange, and other means the commerce of Chicago tributary to the Junction may not some day be burdened by the assertion of individual rights of the owners acquired through this proceeding.

Before we can grant authority, under the transportation act, 1920, for this transaction it must appear affirmatively [fol. 1035] that the public interest will be thereby promoted. It is not sufficient to show that no detrimental effects will follow. The sole advantages pointed out by the majority report are the acquisition of additional downtown terminals in Chicago by the Central, the operation of the Junction and Harbor Belt as a unit with the corollary opportunity for expansion upon the outer belt, and the direct financial backing of a proprietary trunk line. The present terminals are open to the Central on the same terms as are afforded other roads. The prophesied advantages of unified operation are vague and indefinite, potential rather than actual. No complaint has been made as to present service or facilities, and there is evidence that the existing properties are not now used to full capacity. The remoteness of the hinted advantages which are the necessary basis for our approval is indicated by the terms of the order which eliminate from the transaction all prospect of present public gain by rigid maintenance of the existing times and places of interchange, and compulsory adherence to existing operating conditions.

The problem of terminals can not be solved in a year. It is a continuing one capable of solution only gradually by successive steps in the right direction in each locality. The present may prove to be a serious step in the wrong direction.

Commissioner Aitchison authorizes me to state his concurrence in this dissent.

EASTMAN, Commissioner, dissenting:

This proceeding has to do with a terminal railroad property in the city of Chicago serving the greatest market for live stock and packing-house products in the world and an industrial district already highly developed and capable of much expansion. For many years this property has been operated independently with financial profit to its owners and to the satisfaction of its trunk-line connections and of the shippers which it serves, and it is so operated at the present time.

It is now proposed, in effect, to transfer this property in perpetuity to one of its trunk-line connections, the New York Central, by means of a lease at a rental of $2,000,000 per year. We are asked to certify under paragraph (18) of section 1 of the interstate commerce act that public convenience and necessity require this transfer, and also to approve it under paragraph (2) of section 5. There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph (2) of section 5. In my judgment such a transfer as is contemplated is subject to paragraph 6 rather than paragraph (2) of section 5, and can not lawfully be approved by us until a plan of consolidation has been adopted under para- [fol. 1036] graph 5 of that section. However, in view of the conclusion which I have reached with respect to the merits of what is proposed, I shall not undertake to discuss questions of law at this time.

The rental of $2,000,000 per year is equivalent to 6 per cent upon $33,333,333. There is nothing of record to show that the actual investment in this terminal property has been much in excess of $6,000,000 and it clearly appears that by far the greater part of the investment has been derived from surplus earnings. The compensation to be paid for the property is thus very high, and in itself is reason for scrutinizing the transaction with great care. I am not in accord with the theory that the right of railroads or other public-utility companies to a return, through the medium of charges for the service which they furnish, upon unearned increment in real-estate values or upon property representing the investment of surplus earnings is unqualified or unlimited. In this instance it appears that the earnings of the property have been almost wholly derived from trackage or switching charges which have been paid or absorbed by

the trunk-line connections. It follows that they have not been a matter of concern to shippers and that their reasonableness has not been tested.

The suggestion was made on argument that if owners of a property have an opportunity to dispose of it on advantageous terms, it would be an invasion of their constitutional rights if we should refuse to permit the transaction to be consummated. The fallacy of the suggestion is obvious. Owners may have a constitutional right to sell if they can find a purchaser willing and able to buy, but railroad corporations clearly have no constitutional right to buy. The question before us is not whether the owners of this terminal property may sell, but whether the New York Central may purchase. If public control had been exercised over similar purchases by the New York, New Haven & Hartford, great economic waste might have been avoided. The suggestion that such control would have been an invasion of constitutional rights is not one that will appeal to the good sense of the community.

But I do not rest my dissent either upon questions of law or upon questions of price. A fundamental issue of policy is at stake. The proposed transaction is strongly urged by the New York Central and with equal energy condemned by the competing trunk lines. It is opposed by some of the interested shippers and favored, on paper at least, by more. To my mind, however, a more significant and important fact is the opposition of the Chicago Railway Terminal Commission, an official commission of the city of Chicago, created by ordinance and charged with the duty of studying the railway terminal situation, both passenger and freight, in that city.

[fol. 1037] We are here dealing with a problem which, in many of its aspects, is essentially local and for that reason, if for no other, the views of this Chicago Railway Terminal Commission would be entitled to great weight. They are the more persuasive, however, because they are the views of men of known reputation and ability who have made a study of the railway terminal situation, not only of Chicago, but of many of the more important cities of the United States, Canada, and Europe, and because they are views which in themselves have force because of their intrinsic merit.

The Chicago commission is impressed, as a result of its investigations, by the vast importance of the railway terminal problem in this country and the opportunities which its

proper solution offers for the elimination of waste and the improvement of service. The following passages from its preliminary report indicate the trend and the basis of its views:

"With respect to terminal facilities and services, at least, the advantages of competition seem negligible when compared with its disadvantages. * * *

The complete application of the competitive system to railway freight terminals falls of its own weight. Each road can not secure and maintain terminal facilities covering the entire terminal area of such a city as Chicago. It can not secure, maintain, and operate adequate facilities in each and every section or district within the metropolitan terminal area where important freight traffic is to be had. In many cases this is physically impracticable, and in many more cases it is financially impracticable. Nevertheless, the attempt is made—under existing methods—to cover as much as possible of the entire field by separate and competitive terminals, with the resultant complication of facilities, and a financial investment not justified by the revenue earned.

* * * In the terminal district of Chicago as a whole—and the same thing applies to other cities—the unnecessary complication of terminal facilities and operating costs is so extensive that it is appalling in its effect upon the railroads, the shippers and the public; and the future outlook along these lines is by many—in and out of railroad service—believed to be becoming worse and worse. The investments by railroads in unused or little used property to protect real or fancied competitive positions or interests, is also a source of great expense to the railroads and ultimately to the public—although not often fully realized as such. The interest on these investments is absorbed in the general interest charges on the entire property and is thus lost sight of as being an expense due to unproductive investments, nor is due allowance made for the natural accretion in the value of such property, which is often withheld from profitable use for considerable periods of time.

If the terminal situation were treated cooperatively instead of competitively, there would be an immediate simplification of the tangled network of tracks that now exist; the release for general commercial purposes of much valu-

able property now held by railroads for present competitive purposes or prospective competitive needs; the reduction of operating costs in the terminal handling of freight and the increase of efficiency. To the public this would mean not only the improvement of the service to the shippers, but the reduction of the street congestion and the removal of existing obstacles to the growth and development of the city. [fol. 1038] And by such reasoning it arrives at the following general conclusion:

It is already clear, however, that the key to the solution of our railway terminal problem—with respect to freight as well as with respect to passengers—is to be found in the substitution of joint and cooperative terminals for separate and competitive terminals; this substitution to be brought about not by some sudden or drastic adoption and execution of a complete revolutionary plan covering the whole railway terminal situation, but by such steps as may be taken from time to time with due regard to financial and operating conditions. Certain important steps of this character undoubtedly can and should be taken at once or in the near future for the establishment of cooperative terminals and the readjustment of existing terminals to conform to correct principles of terminal development. But the essential thing is that from now on no steps shall be taken in the opposite direction, thus creating unnecessary barriers to proper development in the future.

In its opinion, the issue in this proceeding is "whether it will be more in the public interest to have the Chicago Junction Railway controlled by a single terminal agency controlling also the other terminal facilities within the Chicago terminal district, or to have the Chicago Junction Railway controlled by a single trunk line such as the New York Central Railroad. Or, rather, the issue is whether if the former be the better public policy the acquisition of the control of the Chicago Junction Railway at this time by the New York Central Railroad will constitute an obstacle to the future adoption and development of the sounder public policy." The Chicago commission answers this latter question in the affirmative; but it asks and earnestly urges that for our own guidance and the guidance of the railroads and of the public we reach our own conclusions, before approving the transaction here proposed, as to the "principles of a sound and beneficial railway terminal policy to which fu-

ture development should be made to conform," and decide this case accordingly.

In this connection it calls our attention to the following statement of former Chairman Clark of this commission before the Committee on Interstate and Foreign Commerce of the House of Representatives in July, 1919:

If I had my way I would begin this idea of merger and cooperation with the terminals, and I would provide, if I had my way and the direction of it, in every large commercial center for a terminal association or corporation which would be a separate entity. I would make it the terminal agency of all the roads that reach the place, operated as nearly as could be figured out at cost. Then the railroad serving that place would turn over the traffic destined to the place to this terminal agency and it would be delivered where the consignee wanted it delivered on any of the tracks. There would not be any question about closed or open terminals; there would be one terminal for all.

Mr. Rayburn: You think that would be an efficient arrangement?

Mr. Clark: I do, yes, sir.

Mr. Rayburn: It would mean in all probability a saving?

Mr. Clark: A great saving in expenditure, a great increase in efficiency and the elimination of endless friction. [fol. 1039] It also directs our attention to the following passage from the report on consolidation of railways made to us by William Z. Ripley and appearing in Consolidation of Railroads, 63 I. C. C., 455, at pages 483, 484:

But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this

end, it is submitted that a *proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan.* No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as its intimate connection with consolidation. *The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems.* Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike. [Italics mine.]

The majority dismiss the plea of the Chicago commission with the statement that it is "obviously impossible for any one to determine at this time the ultimate goal which ought to be attained." Pending final determination of future policies, they believe that "the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation," and think that this can best be accomplished "by bringing the present neutral Junction properties into closer relation with a trunk line like the Central." Nevertheless they are apparently sufficiently in doubt as to the good to be attained from this "continuance" of competition so that they feel it necessary to surround the transaction by 17 more or less complicated conditions which can

only be enforced, if at all, by constant surveillance and policing.

[fol. 1040] I have little sympathy with this plan of conditions. Either the transaction should be approved, or it should be disapproved. If it is not so meritorious that it will yield good results in the natural course of events, it never can be made to do so by all manner of paper commandments. But, aside from this, I submit that what the majority are proposing is in no sense a "continuance of the competitive terminal situation," but rather an enlargement and extension of this situation. What has been neutral will cease to be neutral, and to that extent it will be more difficult to retrace our steps if we finally discover that "the ultimate goal which ought to be attained" is not competition but cooperation. And the situation is in this respect the more serious in that we are here dealing with a terminal property serving exclusively the greatest market for live stock and packinghouse products in the world. The transfer of such a property, now neutral, to the possession of a single trunk line is most assuredly no small or insignificant departure from a policy of terminal cooperation and coordination.

For my own part I do not believe that it is at present impossible to determine the "ultimate goal to be attained." If it is impossible, we can at least follow the best light that we now have, and certainly we ought not to delude ourselves into believing that we are maintaining the status quo when we are in fact countenancing a very radical and important step towards one possible ultimate goal and away from another. Moreover, I have no hesitation in expressing a conviction, based on such knowledge as I now have, that former Chairman Clark and the Chicago Railway Terminal Commission are right in believing that the ultimate goal is the "substitution of joint and cooperative terminals for separate and competitive terminals," and that the attainment of that goal would make possible far-reaching economies and improvements in service.

I agree also with the Chicago commission that the public benefits which the New York Central claims will flow from the acquisition of the Junction property are either vague, uncertain, and illusory or quite possible of attainment without such acquisition. The record does not support the conclusion that there will be any public loss if the transaction

is disapproved. In my opinion it will be an obstacle to the future proper solution of the Chicago terminal situation, will embarrass our determination of a plan of consolidation under section 5 of the interstate commerce act, will be contrary to the public interest, and ought not to be approved.

Commissioner Cox also dissents.

[fols. 1041-1042] Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 16th Day of May, A. D. 1922

Chicago Junction Case

Finance Docket No. 1165

Application of The New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock or Property

A hearing and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized: Provided, That the right to prescribe the terms, methods, and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission; and provided further, That the purchase and sale of said stock and the making of said lease, as herein authorized,

shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive.

And it is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 1043] Before Interstate Commerce Commission

Finance Docket No. 1165

Chicago Junction Case

Submitted June 1, 1928. Decided December 3, 1928

Upon Further Hearing, Condition Numbered 14 in the Original Report in This Proceeding, 71 I. C. C. 631, 641, Modified

Robert J. Cary for Chicago River & Indiana Railroad Company and New York Central Railroad Company.

Mark W. Potter for Chicago Junction Railway Company.

Ernest S. Ballard, James Dale Them, and Butler, Lamb, Foster & Pope for Harris Brothers Company, intervener.

Luther M. Walter for Pullman Couch Company, intervener.

Report of the Commission on Further Hearing

By the Commission:

In our original report and order in this proceeding, issued May 16, 1922, 71 I. C. C. 631, we authorized the Chicago River & Indiana Railroad Company to lease the Chicago Junction Railway, and also authorized the New York Central Railroad Company to acquire control of the Chicago River & Indiana Railroad Company by purchase

of its capital stock; both authorizations being subject to certain conditions stated in the report. In the same proceeding, the application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company was denied without prejudice to future proceedings. These companies will be referred to hereinafter as the River Road, the Junction, and the Central.

The railway properties of the River Road and the Junction together form very important terminal facilities in the Chicago switching district, and acquisition of control of these properties by the Central was strongly opposed by other railway companies reaching Chicago and desiring the service of these facilities, and by various shipping interests, the ground of opposition being, in substance, that acquisition by a single trunk line serving the Chicago district would endanger the impartial service of the terminal. To avoid such a result, and otherwise to protect the public interest, the authorizations were made subject to 17 conditions, which were set forth in our report. Among these [fol. 1044] conditions was one numbered 14, reading as follows:

Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

The amount of rental reserved under the lease, as executed pursuant to our order, was $2,000,000 per year, which was arrived at by computing 6 per cent upon an assumed value of $33,333;333.

Condition No. 17, of the original report, provided that any party or person having an interest in the subject matter of the report might at any subsequent time make application for such modification of the conditions, or any of them, as might be required in the public interest, and jurisdiction was retained to reopen the proceeding for such purpose. Referring to this provision, as well as to the provisions of the act, the Central, the Junction, and the River Road petitioned that the former report and order be modi-

fied by striking therefrom condition No. 14, above quoted, and that we make a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid by the River Road to the Junction, is just and reasonable. Petitioners allege that such action is necessary in order to remove an ambiguity, in that a failure to find the rental just and reasonable was inconsistent with the apparent intent of the order, which was to authorize the execution of the lease upon consideration of the rental proposed, subject to conditions applicable thereto. Hearing was set upon this petition for the sole purpose, as stated in the order, of receiving evidence "as to whether the report and order issued herein on May 16, 1922, should be amended by striking therefrom condition No. 14, and by inserting a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid by the Chicago River & Indiana Railroad Company to the Chicago Junction Railway Company, is just and reasonable." Hearing was held on December 19, 1927, at which the petitioners submitted evidence of the value of the properties in question and their earnings since the effective date of the lease, and referred to portions of the record in the original hearing bearing upon the value of the same properties.

At the time of the original hearing we had not completed our valuation of the properties under section 19a of the act, but evidence was then submitted tending to show a cost of reproduction of the Junction properties at the time of the hearing, including the value of its leases, of consider- [fol. 1045] ably more than $33,000,000. At the hearing on December 19, 1927, there was placed in evidence our report of the tentative valuation of the property of the Junction as of June 30, 1919, showing a total value of property used by that company on that date of $31,667,626. Petitioners insist that the report does not give sufficient recognition to intangible values and that for this and other reasons the total value at the time of the further hearing was considerably in excess of $33,000,000. Of the total value thus found, about $23,800,000 was made up of land values. In further evidence of the propriety of the amount of rental reserved, there has been placed in the record a statement of the earnings of the Junction properties since the effective date of the lease showing that after the payment of

rental at the rate of $2,000,000 per year the net income of the River Road attributable to the operation of the Junction for the period May 19 to December 31, 1922, was $854,482; for the year 1923, $847,161; for the year 1924, $479,466; for the year 1925, $164,737; for the year 1926, $551,768; and for the 10 months ending October 31, 1927, $395,381.

While the record upon the original hearing was somewhat indefinite on the question of value of the leased property, it was sufficient to support a finding that the rental consideration was just and reasonable to the extent necessary for a favorable decision upon the application, and the report and order should not be otherwise construed. The propriety of such a finding is supported by the additional facts now in evidence. The original report will be sufficiently amended by striking therefrom the concluding portion of condition No. 14, reading "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable." This amendment will be made.

At the further hearing a copy of the lease executed May 19, 1922, three days after the issuance of our original report, was placed in the record. Although it refers to our authorization and purports to be based thereon, it nevertheless contains a provision giving the Central, its successors and assigns, the option to purchase, subject to our approval, at a stated price, all of the leased properties at any time during the term of the lease or any extension thereof.[1]

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[1] Article XII of the lease reads as follows:

"*Grant to the Central Company of an Option to Purchase Demised Premises:* The Junction Company and the Yard Company hereby severally covenant and agree that subject to the approval pursuant to law of the Interstate Commerce Commission or of such other public authority, State or Federal, as may have jurisdiction in the premises, the Central Company, its successors and assigns, shall, at its or their option, to be exercised at any time during the term of this lease or of any extension thereof, have the right to purchase and acquire all of the right, title and interest of the Junction Company and the Yard Company in the properties and appurtenances real and personal by this indenture demised and leased or assigned, or transferred (in-

[fol. 1046] Harris Brothers Company, of Chicago, intervened at the further hearing for the purpose of securing an appropriate condition or other provision to prevent any implication that the granting of the relief prayed for by the petitioners may be construed as approving or sanctioning the option which was denied without prejudice in our original report. The Pullman Couch Company also intervened at the oral argument, in effect joining in the request [fol. 1047] of Harris Brothers Company. The carriers take the position that the option, as contained in the existing lease, is innocuous for the reason that it could not be exercised without coming to us for further authority. They nevertheless plead for the retention of the provision in order that it may be available for possible future action. They distinguish between the granting of an option and its exercise, and point out that the original report and order simply denied without prejudice the application "for authority to purchase the capital stock or the physical property" of the Junction. Such construction is not warranted. The order of May 16, 1922, must be construed as applying to the request for approval of the option sought

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cluding all the premises and properties leased by the Yard Company to the Junction Company under the said lease dated December 1, 1913, and leases supplemental thereto mentioned in item (2) of Section 1 of Article 1 hereof, but not including the interests of the Yard Company in any properties held by the Junction Company under other leases from the Yard Company), intending hereby to grant to the Central Company, its successors and assigns, an option to purchase and acquire for the price and upon the terms and conditions hereinafter specified all the right, title and reversionary interest of the Junction Company in all of the premises, properties and other interests hereby demised and all the right, title and reversionary interest of the Yard Company in and to the premises and property demised by said lease of December 1, 1913, and/or any and all supplements thereto. The price therefor shall be the sum of thirty-three million, three hundred and thirty-three thousand, three hundred and thirty-three dollars ($33,333,333) payable in cash or in such securities as the Junction Company, the Yard Company and the Central Company shall agree upon. The Central Company shall give to each the Junction Company and the Yard Company sixty (60)

in that proceeding. The lease should therefore be reformed to the extent necessary to bring it into conformity with our authorization.

An appropriate amendatory order will be issued.

AITCHISON, Commissioner, concurring:

In the original report herein, 71 I. C. C. 631, 644, I am noted as dissenting as to the arrangement proposed being in the public interest. That is the initial question to be determined in passing upon applications of this character. It is not before us now, and is foreclosed by the original decision, and the recent refusal of the commission to reopen the proceeding for a consideration of that question. Assuming that question to be determined in favor of the application, the remaining question is as to whether the terms and conditions of the proposed lease are reasonable and just. Upon that assumption, I can concur in the determination that the lease, modified as indicated in the original report and the foregoing report on further hearing, meets the requirements of the statute.

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days' notice in writing of its intention to exercise the option herein provided for, and the Junction Company and the Yard Company hereby severally covenant and agree that upon receipt of said notice and the approval of the public authorities whose approval is required by law each will, at the termination of said sixty (60) days and upon receipt by it of its portion of said purchase price, as hereinafter stipulated, execute and deliver to the Central Company or to its nominee such deeds and other instruments as will effectively convey to the Central Company or to its nominee all their respective right, title and interest in and to the premises, properties and interests above described to be so purchased, such deeds or other instruments to contain full covenants of general warranty with respect to any properties now owned by said companies respectively in fee simple, and covenants of special warranty as to all other properties. The Junction Company and the Yard Company further severally covenant that the properties to be so conveyed shall be free and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "C" hereto attached, or shall hereafter be created or placed upon the same by the River Company or the Central Company, or with the consent in writing of either of

EASTMAN, Commissioner, dissenting:

Without going into the details, which are complicated, the sum and substance of this matter is that for the possession and use of the properties of the Chicago Junction a rental is being paid which, after providing for the rentals which the Chicago Junction itself pays on a large part of the properties, nets that company a huge yearly profit. In justification of this rental reliance is placed upon earnings, especially those since the lease became effective, and upon our tentative valuation of the properties, which in part are owned by the Chicago Junction but for the most part are leased by it, largely in perpetuity, at rentals which in comparison with the rental here approved are very low. The evidence as to earnings is of little consequence, for they have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunk-line connections. It follows that they have not been [fol. 1048] a matter of concern to shippers, and the competition of the trunk lines for the traffic prevents complaint upon their part. Hence the reasonableness of these charges

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these last named parties, the Central Company to take the same subject thereto and to this lease), and if at the time of the conveyance of said properties any liens, encumbrances or other obligations shall exist upon the same except as specified above, or if for any cause either the Junction Company or the Yard Company shall be unable to convey any as aforesaid portion of said properties or of improvements thereon subject to the option of purchase in this Article XII provided for, (where such inability is not caused by limitation in an instrument or agreement mentioned in said Exhibit C), the amount of any such lien, encumbrance or other obligation, or the value of any property or improvement which cannot be so conveyed, shall be deducted from the purchase price therein provided for.

"The Central Company shall by covenants in such instruments of conveyance contained assume or agree to perform all obligations imposed on either the Yard Company or the Junction Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit "C" or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said

has not been put to the test. So far as the New York Central is concerned, being the ultimate lessee of the properties, it is also the ultimate beneficiary if earnings are excessive.

The valuation evidence is of more consequence, but analysis shows that the reason why the tentative valuation is high enough to be used in justification of the amount of the rental is because it is based largely on estimates of land values which have increased very greatly since the land was originally purchased or leased. This raises a question of vital public importance. The provision of public highways for rail transportation is a function of the State, according to numerous decisions of the Supreme Court. If this public work is to be performed by private companies, they should be fairly compensated. It is right that they should be protected in every way in an opportunity to earn upon the capital which they devote to the enterprise a return which will amply encourage the further investment of funds which the work in general continually requires. This is a just and economically sound policy which ought to be scrupulously followed. But it is not right nor just nor economically sound that these private companies should be given, in addition, an opportunity to earn a return upon a further amount which does not represent funds which they have invested but which represents increment in the estimated value of property, particularly lands, which they own or use.

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properties or imposed upon either of said corporations by any ordinance, regulation or requirement, present or future, affecting or relating to said properties, of the City of Chicago, or other public body, or by any law of the United States or of the State of Illinois.

"The Central Company shall pay of said purchase price twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516) to the Junction Company and ten million, three hundred and forty-five thousand, eight hundred and seventeen dollars ($10,345,817) to the Yard Company.

"The Junction Company and the Yard Company hereby further covenant and agree that each will take such corporate action as may be necessary and appropriate to make effective the conveyances and transfers in this Article provided for."

The result of the latter policy is that the community gains no benefit whatever from the timely devotion of property to public highway use, but must always pay as if the property were being acquired anew each year in the most untimely and improvident fashion. If the State had itself acquired the property originally, a return upon such an increment in values would not only never be sought but in due time the original debt would be retired and cease to be a burden. Such gradual retirement of debt is sound and conservative public finance, but under the prevailing policy when a private railroad company undertakes the same work the corresponding burden upon the public never grows less but on the contrary continually increases and with menacing rapidity where terminal lands in great cities are involved. The notion that a policy which produces such results is right, just, and economically sound is not the product of clear thinking but rests upon assumed property rights which in truth have no solid foundation. Such a policy will never be corrected unless it is analyzed and dissected and its inevitable consequences made plain. In my judgment that is proper and very appropriate work for a public body like [fol. 1049] this commission. An excellent way to begin this work would be to find that the terms and conditions of the lease here involved are unjust, unreasonable, and contrary to the public interest.

I am authorized to say that Commissioner McManamy joins in this dissent.

Chairman Campbell dissents.

Order

Entered December 3, 1928

Further hearing and investigation of the matters and things involved in this proceeding having been had, and this commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That condition numbered 14, as contained in the original report in this proceeding, 71 I. C. C. 631, 641, be, and it is hereby, amended by striking therefrom the words "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River

Road for the lease of the Junction properties is just and reasonable."

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 1050] Interstate Commerce Commission

Investigation and Suspension Docket No. 1301[1]

Live Stock Loading and Unloading Charges

Submitted March 18, 1921. Decided April 2, 1921

Proposed increased charges for loading and unloading ordinary live stock at public stockyards at Chicago, Ill., and other western points, and proposed absorptions of such charges by railroad common carriers engaged in the transportation of such live stock, found justified. Orders of suspension vacated and proceeding discontinued.

Ralph M. Shaw and Brown & Boyle for Union Stock Yard & Transit Company of Chicago, Ill.; Luther M. Walter for Kansas City Stock Yards Company, St. Louis National Stock Yards, Oklahoma City Stock Yards, and Wichita Stock Yards; R. D. Rynder for Sioux City Stock Yards Company and St. Joseph Stock Yards Company; H. K. Crafts for Fort Worth Stock Yards Company; and Norris Brown for Union Stock Yards of Omaha, Nebr.

S. H. Johnson for Chicago, Rock Island & Pacific Railway Company and other western lines; C. E. Spens for Chicago, Burlington & Quincy Railroad Company and other western lines; and James Webster and H. H. Johnson for railroad lines eastbound from Chicago, Ill.

Report of the Commission

Division 2, Commissioners Clark, McChord, and Daniels.

By Division 2:

By schedules filed to become effective in March, 1921, the Union Stock Yard & Transit Company, of Chicago, Ill., proposed to increase its charges for loading and unloading ordinary live stock at its yards, and various common carriers by railroad proposed to absorb such increased charges

[1] This report also embraces Investigation and Suspension Docket No. 1312, Live Stock Loading and Unloading Charges.

and to provide for the establishment or absorption of similarly increased charges at other stockyards at various western points. By appropriate orders the schedules have been suspended until June 29, 1921, and later dates.

The stockyards here concerned respectively perform for the respondent common carriers engaged in the transportation of ordinary live stock the service of loading and unloading included in the transportation by virtue of section 15 (5) of the interstate commerce act, and the charges for [fol. 1051] the service are accordingly paid out of the line-haul rates. For many years past charges for the respective services of unloading and loading have been 50 and 75 cents at Chicago, $1 per car deck at South St. Paul, Minn., $1 per car at Denver, Colo., and 50 cents per car at the other yards. The proposed charge is $1 per car for each service at all yards.

Except for variations in the size of the properties and in the volume of traffic, the arrangement of facilities and the character of operations in the particular service are much the same at the several yards. Incoming shipments are switched alongside so-called chute pens, into which the live stock is unloaded. From those pens, unless promptly removed by the consignees, such of the stock as is not disabled is transferred to adjacent relief pens, beyond which point the service for which the carriers are chargeable is not deemed to go. An exception is found at Sioux City, Iowa, where relief pens are not provided and where the service charged for is confined to the transfer between cars and chute pens. The operation of unloading includes the opening of car doors, removal of "bull bars" placed within the cars to prevent pressure of cattle against car doors during transit, removal of partitions in cars containing mixed shipments, placement of chutes between cars and chute pens, driving out ab. bodied animals, and more or less commonly the removal of dead and crippled animals. The latter, more particularly hogs and sheep are handled by means of so-called "crip carts," are tagged for identification, and are removed to special pens. The work of unloading is somewhat increased in the case of double-deck cars. The operation of loading, while necessarily varying in some details and confined to a generally smaller volume of traffic, is more or less the reverse of that of unloading.

The cost data submitted to justify the proposed increased charges are based upon the labor, accounting, and facilities purporting to have been devoted to the particular service during the year 1920, the figures for Chicago alone showing a separation of cost per car as between loading and unloading. In addition to labor costs, the items include supervision, accounting, electric lighting of the loading and unloading docks for night work, depreciation of or repairs to the facilities used, cleansing and disinfecting the facilities, fire and liability insurance, loss and damage, taxes, and the like, allocated to the service in question. These data, which need not be reviewed in detail, show direct labor costs ranging from 63.62 cents per car at St. Joseph, Mo., to 99.67 cents at Chicago. Other stated items of cost increase the figures in varying degrees. At all the yards the average cost of performing the service of loading and unloading is shown [fols. 1052-1053] as having to a greater or less extent exceeded $1 per car, and there is nothing of record to suggest that the costs are now appreciably diminishing.

Prior to the filing of the suspended schedules a committee representing the western carriers, after a somewhat extended investigation, recommended a uniform absorption of 85 cents per car, which would approximate the 50-cent charge, plus the 25 per cent increase under general order No. 28 of the Director General of Railroads, plus the 35 per cent increase in western territory pursuant to Increased Rates, 1920, 58 I. C. C., 220. The carriers, however, recognizing that the cost of the service is generally higher than that figure, agree to the proposed increased charges, and believe that the same charges should apply at all points.

We here express no opinion concerning the precise point at which the loading and unloading service for which the carriers are responsible begins or ends or concerning the precise extent to which the exhibited items are properly chargeable to the carriers as part of the transportation service. We confine our finding to the necessities of the case, namely, that upon all the facts of record the proposed increased charges and absorptions have been justified. The orders of suspension will be vacated accordingly and the proceeding discontinued.

[fols. 1054-1055] BEFORE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4296

Cancelation of Live Stock Services at Chicago

ORDER POSTPONING EFFECTIVE DATE OF ORDER—Nov. 21, 1938

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of request duly made:

It is ordered, That the order entered herein on July 11, 1938, which was by its terms made effective on August 17, 1938, upon not less than one day's notice, as subsequently modified to become effective January 1, 1939 on one day's notice, be, and it is hereby, further modified to become effective on January 1, 1940, upon not less than one day's notice.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

A true copy: W. P. Bartel, Secretary of the Interstate Commerce Commission.

Supplement No. 13 to I. C. C. No. 12 canceling Supplement No. 12 and postponing Supplement No. 5. Supplements Nos. 4, ① 5, ② 6, ③ 11 and ④ 13 contain all changes from the original tariff.

SUPPLEMENT NO. 13 TO

U. S. Y. & T. Company No. 9

CANCELS SUPPLEMENT NO. 12

Supplements Nos. 4, ① 5, ② 6, ③ 11 and ④ 13 contains all changes from the original Tariff.

The Union Stock Yard and Transit Company

OF CHICAGO

TARIFF

Naming Loading and Unloading Charges

ON

LIVE STOCK

at Union Stock Yards, Chicago.

The effective date of Supplement No. 5, filed to become effective January 15, 1937, but suspended by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4296 to August 15, 1937, is hereby postponed to January 1, 1940. Rates as published in I. C. C. No. 12 and Supplement No. 4 will continue in effect.

ISSUED NOVEMBER 30, 1938 EFFECTIVE DECEMBER 31, 1938

Issued under authority of Rule 9 (k) of Tariff Circular 20.

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Issued under authority of Rule 9 (k) of Tariff Circular 20.

Issued by
O. T. HENKLE, Vice President and General Manager
The Union Stock Yard and Transit Company of Chicago.
Chicago, Illinois

(S) Under suspension and later postponement.
(SS) Suspension notice.
(C) Cancellation notice.
(P) Postponement notice.

644A

[fol. 1058] EXHIBIT No. 2

Act of Incorporation and By-Laws of the Union Stock Yard and Transit Company of Chicago

Incorporated February 13, 1865

By-Laws adopted by the Board of Directors April 19, 1865

[fol. 1059] Charter

An Act to incorporate the Union Stock Yard and Transit Company of Chicago.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That John L. Hancock, Virginius A. Turpin, Roselle M. Hough, Sidney A. Kent, Charles M. Culbertson, Lyman Blair, David Kreigh, Joseph Sherwin, Martin L. Sykes, Jr., George W. Cass, James F. Joy, John F. Tracy, Timothy B. Blackstone, Joseph H. Moore, John S. Barry, Homer E. Sargent, Burton C. Cook, John B. Drake, William D. Judson, and such other persons as may associate with them for that purpose, be, and the same are hereby made a body politic and corporate, by the name and style of "The Union Stock Yard and Transit Company of Chicago," with perpetual succession; and by that name and style may contract and be contracted with, sue and be sued, have a common seal, which they may alter and revise at pleasure, and may have and exercise all the rights, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as the same are herein set forth.

Sec. 2. That said company shall have the power to locate, construct and maintain, upon the land purchased for such purpose, in convenient proximity to the southerly limits of the city of Chicago, and west of Wallace street, as the same would be extended in a straight line south from said city limits, all the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches and turnouts, aqueducts, for the reception, safe keeping, feeding and watering, and for the weighing, delivery and transfer of cattle and live stock of every description and also dead and undressed animals that may be at, or passing through or near the city of Chicago, and for the accommodation of the business of a general Union Stock Yard for cattle and live stock, including the erection and establishment of one or

more hotel buildings, and the right to use the same, if deemed expedient, for the convenience of drovers, dealers and the public doing business at the said yards; and shall have power to repair, enlarge, relocate, reconstruct and alter the said yards, structures and buildings, or any of them, as shall become necessary or expedient from time to time; subject, nevertheless, to the restrictions above mentioned as to the location of the same; and shall have the right and power to make advances of money upon such cattle and live stock, for freight or other purposes, as may become expedient, and for such care, subsistence and handling, and advances made upon such stock, the said company may take and require to be paid, such reasonable charges as may be deemed just and proper; and shall have the power to lease the public house or hotel building so erected for the accommodation of those drawn together by the business of such yards, upon such terms and conditions as shall be deemed proper, or to make such other arrangements for the management thereof as may be deemed advisable, from time to time; and if the same shall be kept and managed by said company, shall have the power to fix and require to be paid, such reasonable charges for the accommodation afforded by said house or houses, as shall be just and proper.

Sec. 3. The said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, and on the west between said last named point and the north line of section number nineteen (19), township number thirty-nine (39) north, range fourteen (14), east of the third principal meridian, [fol. 1060] and shall have the right and power to make such connections with such suitable side tracks, switches and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies, which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; and shall have the power and

authority to locate, and, from time to time, renovate, change, alter, construct and reconstruct, and fully to finish and maintain its said railroad or roads, side tracks and connections, and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same, to and from said yards, and may also transport and allow to be transported between the railroads entering said city, and so connected by the road or roads hereby authorized, by steam or other power, freight and property of every kind as well as stock and cattle, and may fix and establish, take and receive, such rates of toll for all freight and property so transported between said several railroads as the directors shall, from time to time, establish: Provided, all fees and charges for freights, hotel bills, feeding, carrying and everything done by reason of the powers herein given, shall be subject to any general law that may be passed by the legislature of this state, in reference to stock yards or railroads; and for the purpose of constructing said railroad and appurtenances, shall have the authority and power to lay out, designate and establish the road, in width not exceeding one hundred feet through the entire line thereof, and to mark out and designate the ground for such yard and other structures, and may acquire such lands, which may be necessary for the purpose of constructing said tracks, either by purchase or in the manner hereinafter provided, with the right to let or demise the real estate and property so acquired, and improvements thereon; and shall also have the right and authority to take a lease or leases of ground for said yards, upon such terms as the directors of said company may deem just and reasonable, and all contracts and agreements made in connection with such lease or leases shall be valid and binding upon the parties thereto; and said company shall have the right, with the consent of the proper authorities having control thereof, to locate or construct its roads across any street or highway, doing as little damage and discommoding the public as little as may be consistent with the use of said track so laid.

Sec. 4. The said company shall have power and authority to receive, take and hold all such voluntary grants and donations of land and real estate as may be made to said company, for the purpose aforesaid, and may contract and agree with the owners and occupiers of any land which may be necessary for such purposes, or which said company may desire to use in connection therewith, in order to carry out

the objects of its organization; and said company is authorized and empowered to receive and take grants and conveyances of all interests and estates in such lands to them and their successors and assigns, in fee or otherwise, and in case the said company cannot agree with the owners or occupiers of lands, necessary for the railroad tracks herein permitted to be constructed, so as to procure the same by the voluntary deed of such owners or occupiers, or if such owners or occupiers or any of them be a femme covert, infant non compos mentis unknown or out of the county of Cook, the same may be taken for the purpose of constructing said railroad track, (but for no other purpose,) and paid for, if any damages are awarded, in the manner provided for in the "Act to amend the law condemning the right of way for purposes of internal improvement," approved June 22, A. D. 1852, and the acts amendatory thereof, to the benefits of all the rights, privileges, franchises and immunities contained in the provisions of which said act and the amendments thereof, said company shall be, and are hereby declared entitled.

[fol. 1061] Sec. 5. The capital stock of said company shall be one million of dollars, which stock shall be divided into shares of one hundred dollars each, which shall be deemed personal property, and may be taken and held by individuals, and may be issued to such persons, and certified, transferred and registered in such manner and in such places as may be ordered and provided for by the board of directors, who shall have the power to require the payment for the stock subscribed, in the manner, at the time and in such terms as they may direct; and the same may be paid for in real estate or in personal property, under the direction of said board of directors, who shall, also, have power to declare dividends upon profits earned by said company. On the refusal or neglect of any stockholder to make payment on the requisitions of the board of directors, the share or shares of such delinquent may, after thirty days' public notice in one of the daily newspapers of Chicago, be sold at public auction, under such rules as the directors may adopt.

Sec. 6. The corporate powers of said company shall be vested in and exercised by a board of directors, to consist of not less than five nor more than nine in number, and such other officers, agents and servants as they shall appoint. The first board of directors shall consist of Martin L. Sykes, Jacob N. McCullough, James F. Joy, John F. Tracy, Timothy

B. Blackstone, John L. Hancock, Roselle M. Hough, Charles M. Culbertson, and Virginius A. Turpin, who shall hold their office until the third Wednesday of January, A. D. 1866, and until their successors are elected and qualified. Vacancies in said board may be filled by a vote of two-thirds of the directors remaining, such appointees to continue in office until the next regular annual election of directors, and which said annual election shall be held on the third Wednesday of January in each year, at such place as the directors may appoint, thirty days' notice being given in one newspaper in Chicago, of the time and place of such election.

Sec. 7. At any election of directors, each share of stock shall be entitled to one vote, to be given either in person or proxy, and the person receiving the largest number of votes to be declared duly elected, and to hold the office until the next annual election, and until their successors shall be duly qualified; and if for any cause the annual election shall fail, the company shall not be dissolved, but the directors in office shall continue to hold their places as directors, until an election shall be had and their successors duly elected and qualified.

Sec. 8. The directors herein named shall organize their board by electing one of their number president, and by appointing a secretary and treasurer. The said company shall have power to make, ordain and establish by-laws, rules and regulations necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering and securing the affairs, business and interests of the company, provided the same shall not be repugnant to the constitution and laws of the United States or of this state.

Sec. 9. Should it be necessary for the construction of the road or roads, hereby authorized to be built, to cross any water course, stream of water or road, it shall be lawful, under the direction of the proper authorities having control thereof, to construct the said road upon or across the same; provided, the same shall be so constructed as not to unnecessarily impair the usefulness of said road or water course.

Sec. 10. The said company is hereby authorized, from time to time, to borrow such sums of money as it may deem expedient, and to issue and dispose of their bonds therefor in denominations of not less than five hundred dollars each, and to an amount which, in the aggregate, shall not exceed

five hundred thousand dollars, and bearing such rate of interest, not exceeding ten per cent., as the company shall deem expedient, and to secure the payment of the same, may exe- [fols. 1062-1067] cute a mortgage or deed of trust of all its property of every description, in possession or to be acquired, with such terms, stipulations and conditions as may be deemed expedient.

Sec. 11. Nothing in this act contained shall be deemed, taken or construed as conferring upon the company hereby created, any powers or authority to maintain or operate a railroad for the conveyance of passengers or freight in the city of Chicago. And the said company hereby incorporated, is hereby expressly prohibited from making any contract or having any agreement, either expressed or implied, with any railroad company, to receive cattle, hogs or other freight transported over the road of any such railroad company, to the exclusion of any person or corporation having a stock yard in proximity to said city; and said company hereby incorporated, shall not receive any cattle, hogs or other stock consigned to any other person or company having a stock yard in proximity to said city; and any willful violation of any of the provisions of this act by the company hereby incorporated, shall work an absolute forfeiture of all the rights, priviliges and immunities conferred by this act, and the franchises hereby conferred shall become utterly void.

Sec. 12. This act shall be deemed a public act, and shall be in force from and after its passage.

Allen C. Fuller, Speaker of House of Representatives,
William Bross, Speaker of the Senate.

Approved February 13, 1865, Richard J. Oglesby.

Amendment

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the board of directors of the Union Stock Yards and Transit Company of Chicago be, and the same is hereby authorized from time to time, to increase the capital stock of said company five hundred thousand dollars, in addition to its present capital; but no stock shall be issued for a less sum or amount than the par value thereof actually paid in, in cash.

3. Pr. Laws 1867, 7th March, 100.

[fol. 1068]. EXHIBIT No. 3

Indenture of Lease between The Chicago Junction Railway Company, The Union Stock Yard and Transit Company of Chicago, The Chicago River and Indiana Railroad Company, and The New York Central Railroad Company

Dated the 19th day of May, 1922

[fol. 1069] This Indenture, made this nineteenth day of May, 1922, by and between The Chicago Junction Railway Company, a consolidated corporation organized and existing under the Laws of the State of Illinois, hereinafter called the Junction Company, as first party, The Union Stock Yard and Transit Company of Chicago, a corporation organized and existing under the Laws of the State of Illinois, hereinafter called the Yard Company, as second party, The Chicago River and Indiana Railroad Company, a corporation organized and existing under the Laws of the State of Illinois, hereinafter called the River Company, as third party, and The New York Central Railroad Company, a consolidated corporation organized and existing under the Laws, among other states, of the State of Illinois, hereinafter called the Central Company, as fourth party, Witnesseth:

Whereas, the Junction Company owns and operates certain lines of railroad, with various branches and appurtenances, located in and adjacent to the Stock Yard District in the City of Chicago, County of Cook and State of Illinois; and

Whereas, the Yard Company owns and operates certain stock yards located in said Stock Yard District and also owns certain lines of railroad and railroad tracks extending from a connection with the tracks of The Illinois Central Railroad Company at or near the shore of Lake Michigan and 42nd Street, in the City of Chicago, and extending thence in a general westerly and northerly direction to a terminus in Section 24, Township 39 North, Range 13 East [fol. 1070] of the Third Principal Meridian in said City of Chicago, together with various side tracks, industrial tracks, switches, turnouts, crossovers, appurtenances, railroad yards, yard tracks, storage yards and tracks, repair tracks, roundhouse tracks, machine shop tracks and other railroad improvements and appurtenances which by vir-

tue of a certain indenture of lease made and entered into on the first day of December, A. D. 1913, by and between the Yard Company and the Junction Company, and by certain supplements thereto, have been heretofore granted, demised and leased in perpetuity to the Junction Company and are now being operated by the Junction Company in conjunction with and as a part of the railroad properties owned by it; and

Whereas, the River Company owns and operates certain lines of railroad with various branches, spurs, extensions, yards and other appurtenances located in said City of Chicago beginning at a point at or near the intersection of West 39th Street and Western Avenue in said City and extending thence in a southeasterly and southerly direction to West 49th Street; thence westerly in and along West 49th Street extended to Central Park Avenue in said City, which lines of railroad connect with the lines of railroad operated by the Junction Company; and

Whereas, The Chicago Junction Railways and Union Stock Yards Company, a corporation of the State of New Jersey, owner of all of the capital stock of the Junction Company and of the Yard Company, and heretofore owner of fifty (50) per cent. of the capital stock of the River Company, has, pursuant to the terms of a certain agreement made September 27th, 1920, between it and the Cen- [fol. 1071] tral Company, sold and conveyed, or caused to be sold and conveyed to the Central Company all of the capital stock of the River Company, and the Central Company now owns all of the same; and

Whereas, it is mutually desired by the parties hereto that the Junction Company shall lease to the River Company for a term of ninety-nine (99) years, and thereafter in perpetuity, at the option of the Lessee, all of the railroad properties and appurtenances hereinbefore described as owned by or leased to and now operated by the Junction Company; and

Whereas, it is also mutually desired that the Central Company shall be granted an option, to continue during the term of said lease, to purchase either in its own name or in that of its nominee all of said properties so proposed to be leased as above recited; and

Whereas, it will be in the public interest, and the present or future public convenience and necessity require or will require, and it will be to the mutual benefit of the parties

hereto, that the lease and option herein provided for shall be made upon the terms and provisions herein contained; and

Whereas, the Interstate Commerce Commission on the sixteenth day of May, 1922, made its certain order, pursuant to statute in such case made and provided, on the application filed with it listed as Finance Docket No. 1165 duly approving and authorizing the leasing of the properties herein demised.

Now, therefore, in consideration of the premises and of the benefits to be secured hereby to each party hereto and of the mutual covenants and agreements of the parties [fol. 1072] herein contained, said parties do hereby promise, covenant and agree each with the others as follows:

Article I

Demise of Leased Properties

Section 1. The Junction Company does hereby demise and lease unto the River Company, its successors and assigns, for a term of ninety-nine (99) years from and after the date hereof and thereafter, at the election (to be exercised as hereinafter provided) of the River Company or of its successors or assigns, in perpetuity, all and singular the following described premises and properties, rights and interests, to-wit:

(1) Certain railroad properties owned by the Junction Company and described generally as follows:

All of the Iron Street Line (so-called) extending from a point northwesterly of the junction of West 34th Street and Iron Street in the City of Chicago in a general southeasterly and southerly direction to West 39th Street in said City; all of the Racine Avenue Line (so-called) extending from approximately the junction of Pitney Court and Archer Avenue in the City of Chicago in a general southeasterly and southerly direction to West 39th Street; said Iron Street line and Racine Avenue line being shown colored in orange upon maps hereto attached and designated Exhibit "B"; and also the certain parcels of land owned by the Junction Company particularly described in Subdivision One of Exhibit "A" hereto attached and made [fol. 1073] a part hereof, and which parcels are shown colored in yellow upon the said maps hereto attached and designated as Exhibit "B".

(2) All the railroad properties and appurtenances now possessed and operated by the Junction Company under and by virtue of the terms of a certain indenture dated the first day of December, A. D. 1913, by and between The Union Stock Yard and Transit Company of Chicago, party of the first part, and The Chicago Junction Railway Company, party of the second part, and by any and all supplements thereto, which properties are described generally as follows:

All of the railroad rights of way and the line of railroad and railroad tracks belonging to the Yard Company extending from a connection with the tracks of the Illinois Central Railroad Company at or near the shore of Lake Michigan, near 42nd Street, in the City of Chicago, and thence in a general westerly and northerly direction to the terminus in Section 24, Township 39 North, Range 13 East of the Third Principal Meridian, which is under lease to and is now operated by the Junction Company (expressly excepting and excluding from this demise all that portion of the railroad right of way and railroad of the Yard Company east of South Dearborn Street, which has been heretofore leased or granted to The Chicago Junction Railroad Company, an Illinois corporation and was subsequently leased by it to the South Side Elevated Railroad Company), together with the right to exercise (except as hereinafter otherwise provided) pursuant to the terms of said indenture of lease made the first day of December, A. D. 1913, by and between The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Com- [fol. 1074] pany, and supplements thereto, all the rights, grants and privileges therein contained.

The premises in this item (2) mentioned are more particularly described in Subdivision Two of said Exhibit "A" and are shown colored in red upon the said maps hereto attached as Exhibit "B". In evidence of the terms and conditions under which the properties in this item mentioned are held, copies of said indenture of lease of December 1, 1913, and of the several supplements thereto are incorporated herein as Exhibit "D" hereto attached and made a part hereof.

(3) The certain industrial railroad rights of way demised to the Junction Company under and by virtue of the terms of a certain indenture dated the first day of December, 1913, by and between The Chicago Junction Railway Com-

pany, party of the first part, and J. A. Spoor and Arthur G. Leonard as Trustees under the certain deeds of trust recorded in the office of the Recorder of Deeds of Cook County, Illinois, as Documents numbered 3240724, 4021854 and 4158709, respectively, parties of the second part, and any and all supplements thereto, being the premises mentioned in Subdivision Three of said Exhibit "A" and shown colored in green upon the said maps hereto attached as Exhibit "B";

(4) The certain industrial railroad properties demised to the Junction Company under and by virtue of a certain indenture dated the twenty-fifth day of June, 1880, by and between John A. Yale and others, parties of the first part, and The Chicago and Indiana State Line Railway Company, corporate predecessor of the Junction Company, party of the second part, and by any and all supplements thereto, being the premises mentioned in Subdivision Four of said [fol. 1075] Exhibit "A" and shown colored in orange upon the said maps hereto attached as Exhibit "B";

(5) The certain properties held under and by virtue of certain leases, easements or grants (being short term leases and terminable grants) made to the Junction Company, being the premises mentioned in Subdivision Five of said Exhibit "A" and shown colored in blue upon the said maps hereto attached as Exhibit "B";

(6) All rights of way, branches, side and spur tracks, industrial tracks, switches, turnouts, crossovers, railroad yards, yard tracks, storage yards and tracks, repair tracks, roundhouse tracks, machine shop tracks, bridges, depots, station houses, roundhouses, water tanks, machine shops, coal chutes, signal houses, telegraph offices, storage houses and all other structures and improvements and the places, lands or leaseholds upon which the same are built or maintained or used or held therefor, and also all other buildings or parts of buildings, erections, ways and places under whatever tenure held, now in the possession of and used by the Junction Company in carrying on and conducting its railroad business or held therefor; also all telegraph lines, poles, wires, instruments and appurtenances; also all locomotives, cars, handcars and all other rolling stock, whether leased or owned; also all tools and machinery, fixed and movable; also certain materials and supplies on hand not exceeding

in value the sum of Five hundred five thousand dollars ($505,000.) and to be inventoried with other personal property hereby demised as provided in Article XVIII hereof; also all other instrumentalities and appurtenances owned by the Junction Company and necessary or useful in and about the maintenance and operation of said demised [fol. 1076] premises, and all other improvements and appurtenances however held or possessed;

(7) All other easements, grants, trackage rights, licenses and ordinance rights now owned or held by the Junction Company, (the same being hereby for the purposes hereof transferred and assigned to the River Company);

together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, with the right, power and authority in the River Company, its successors and assigns to operate cars, engines and trains upon, over and along the railroad tracks and facilities by this instrument demised, and thereon to pursue the business of a common carrier at and for such tolls, rates, charges and revenues as the River Company, its successors and assigns, may from time to time impose, collect and receive pursuant to law;

To have and to hold the above described premises and properties with the rights, privileges, easements and appurtenances thereunto attaching and belonging unto the River Company for and during the period and term aforesaid; the River Company yielding and paying therefor unto the Junction Company the rental hereinafter provided and complying with all and singular the terms and conditions upon which the demise herein contained is made;

Subject, however, from and after the date hereof, to all the taxes and assessments that may be lawfully charged, imposed upon or levied against said railroad, premises, properties and franchises (not including income taxes (so-called) levied upon the income of the Junction Company [fol. 1077] or the Yard Company) and to all leases, contracts and obligations pertaining to or connected with the railroads, premises, properties, rights, titles, interests, powers, privileges, franchises and immunities hereby demised and leased, enumerated in Exhibit "C" hereto attached, and to all existing ordinances pertaining to or affecting said railroads, premises, properties and franchises, and to all the terms, covenants, reservations, privileges,

limitations, exceptions, conditions and obligations in said leases, contracts, obligations and ordinances contained; which leases, contracts, obligations and ordinances and all the obligations of the Junction Company and of the Yard Company thereunder, the River Company as part consideration for this lease, hereby agrees to assume, bear, pay and perform from and after the date hereof, provided, however, that the Junction Company shall pay such portion of any sums due thereunder as shall be equitably apportionable to the period preceding the beginning of the term hereof, to the end that the River Company shall be charged with only its pro rata share from the commencement of the term hereof of all such obligations.

Section 2: Nothing herein contained shall be deemed to charge to the River Company the principal amount of any obligation listed in said Exhibit "C" incurred on account of any addition, betterment or improvement heretofore added to or made upon the demised premises, the Junction Company hereby agreeing to satisfy any sum due on account thereof or to otherwise protect its disposition at maturity; provided that in event of default by the Junction Company in so satisfying any such sum or in otherwise protecting its disposition at maturity the River Company shall be entitled, [fol. 1078] for the purpose of protecting its own interest, to make, in such case, any payment or payments necessary, or to make such other provision as it shall deem essential for the satisfaction of any such obligation, and to deduct from any subsequent installment or installments of rent due the Junction Company any amount or amounts thus advanced by it.

ARTICLE II.

Rentals and Taxes:

Section 1: The River Company covenants and agrees to pay in the manner and at the times hereinafter set forth as rent hereunder for the properties hereby demised and leased to it the sum of One million, five hundred thousand dollars ($1,500,000) for the first year of the term hereof and the sum of Two million dollars ($2,000,000) per year for each year thereafter; said rent shall be paid to the Junction Company or its assigns in quarterly installments of Two hundred and fifty thousand dollars ($250,000) each for the first six

months of the term hereof and Five hundred thousand dollars ($500,000) each after said first six months, one quarterly installment to be paid on the fifteenth day of each of the months of March, June, September and December of each year of the term hereof, the first installment to be paid on the first one of such quarterly payment dates occurring next after the date of commencement of this lease, provided that if the period preceding the date upon which the first installment of rent shall be due shall not be a full quarter then the first and third installments shall be equitably prorated on the basis of Two hundred and fifty thousand dollars ($250,000) per quarter for the first six (6) months [fol. 1079] of the term hereof and on the basis of Five hundred thousand dollars ($500,000) for such portion remaining of said third quarter as shall succeed said first six months, and provided further that the River Company shall be entitled to deduct from each quarterly installment a pro-rata amount sufficient to aggregate each year the amount of rent payable for such year under said indenture of lease dated December 1, 1913, and supplements thereto, made between the Yard Company and the Junction Company, which is now the sum of Six hundred twenty-six thousand and forty-nine Dollars ($626,049.) and thereupon to pay directly to the Yard Company, on behalf of the Junction Company, the several installments of rent in said last mentioned leases reserved as and when they shall severally fall due. All payments of rent hereunder shall be made in standard gold coin of the United States of America of or equal to the present standard of weight and fineness to the Junction Company or its assigns at such place as it may from time to time designate therefor in writing to the River Company, or in the absence of such designation then at the office of the Junction Company in Chicago, Illinois.

Section 2: The River Company shall in addition pay promptly when due all taxes, general and special and all special assessments that during the term hereof may be lawfully charged, imposed upon or levied against the properties hereby demised and leased, including the general taxes levied for the calendar year 1922 payable in 1923 (but not including however the general taxes payable in the year 1922 levied for the calendar year 1921) and unpaid installments of special assessments heretofore levied, provided [fol. 1080] that the Junction Company shall pay such por-

tion of all such taxes and special assessments which shall have accrued up to the beginning of the term hereof or shall be levied for the calendar year in which such term shall begin, as shall be equitably apportionable to the period preceding the beginning of such term, to the end that the River Company shall be charged with only its pro rata share of all such taxes and special assessments accruing from and after the commencement of the term hereof; and, provided further, that the River Company shall not be required to pay any income taxes (so-called) assessed against the income of the Junction Company or the Yard Company, except that if in the State of Illinois a system of income taxes is substituted in whole or in part for the present system of taxes on real estate and personal property then, to the extent of such substitution, the River Company shall pay of any tax or taxes on income whether of the Junction Company, or the Yard Company derived from rentals hereunder such portion thereof as shall be in substitution for real estate and/or personal property taxes under the present system on the properties hereby demised and leased; and provided further, that the Yard Company shall pay (and it hereby covenants so to do) in the first instance all general taxes (excluding special taxes and special assessments on specific pieces of property) levied or assessed upon or on account of the railroad properties and appurtenances leased by the Yard Company to the Junction Company under the terms of said lease dated December 1, 1913, or any supplements thereto, with the understanding that the River Company, upon proper bills rendered, shall reimburse the Yard Company for the amount of all such taxes from time to time [fol. 1081] so paid by it. The amount of such taxes for any year properly chargeable to said railroad properties and appurtenances so demised by the Yard Company to the Junction Company shall be deemed to be 41% of the sum of all taxes (except special taxes and special assessments and income taxes on income of the Yard Company) assessed and levied for such year upon or on account of all the properties of the Yard Company, including said railroad properties and appurtenances demised under the terms of said lease dated December 1, 1913, or any supplements thereto.

In the event that additions, betterments or alterations made either to the railroad properties and appurtenances demised under said lease of December 1, 1913, or any supplements thereto, or to other properties of the Yard Com-

pany shall make said ratio for dividing taxes inequitable as between the Yard Company and the River Company, then, upon request of either of said parties, the same shall be revised to a ratio that shall equitably reflect the altered situation in relative values.

If, at any time during the term hereof, either party to the above arrangement providing for the payment of taxes in the first instance by the Yard Company and its reimbursement by the River Company shall regard the same as affecting its interests injuriously, then it shall have the right, upon serving sixty (60) days' notice in writing upon the other part, to terminate such arrangement and thereafter the River Company itself shall return for taxation said railroad properties and appurtenances demised under said lease dated December 1, 1913, or supplements thereto, and shall pay directly all taxes assessed or levied thereon or on account thereof.

[fol. 1082] ARTICLE III

Operation and Maintenance

Section 1: The River Company shall have the right to conduct, operate and manage, and will so do at its own sole cost and expense, the premises and properties by this instrument demised, and it will, during the term hereof, at its own sole cost and expense, maintain, renew, replace and repair all of the same.

Section 2: This indenture of lease shall be subject to all the terms and conditions contained in the said indenture of lease of the first day of December, 1913, by and between The Union Stock Yard and Transit Company of Chicago and The Chicago Junction Railway Company, and those contained in any supplements thereto, in respect of the properties and premises therein demised, and to all the terms, limitations and conditions of any and all other contracts, leases or grants under which the Junction Company holds any other properties herein demised, and the River Company hereby covenants and agrees to pay as and when the same shall fall due, the rental and other payments by said lease of December 1, 1913 required to be paid and also all rent and other payments required to be paid by any such other leases, contracts or grants (the rent under said lease of December 1, 1913, to be paid in the manner provided in

Section 1 of Article II hereof) and to perform all of the covenants, undertakings and other obligations required to be performed by the Junction Company thereunder, and the River Company shall have the right to exercise or to [fol. 1083] receive the benefit of all the rights, easements, grants, licenses and other privileges therein demised, leased, assigned, granted or transferred, except as follows:

(a) In respect of the following grant therein contained, to-wit:

"* * * the right to lay down, maintain and operate upon the lands of the Yards additional side tracks, switch tracks, industrial tracks, switches, connections, cross-overs, and appurtenances thereof, necessary to reach industrial plants now or hereafter erected; with the right to rearrange, remove, and replace existing yards, side tracks, switch tracks, industrial tracks, switches, connections and cross-overs, and the same to change, alter and renew at pleasure, and the right to erect such depots and stations as may be reasonable and necessary;"

the River Company shall exercise the same where the properties of the Yard Company not herein demised would be affected, subject to approval by the Yard Company, to the end that the exercise thereof shall not interfere with the efficient and economical operation and development of the properties of the Yard Company. The foregoing provision shall not be deemed to limit in any respect any right at any time existing in the River Company to condemn or otherwise appropriate property for its purposes pursuant to law.

The River Company, shall have the right in respect of all the properties and premises herein demised to rearrange, remove, replace or alter from time to time existing tracks, switches, connections and cross-overs and to alter, remove or change the location of and reconstruct any of the water tanks, coal chutes, signal houses, telegraph offices, [fol. 1084] stations, round-houses, shops or other buildings, erections or appurtenances; provided, however, that where properties of the Yard Company not hereby demised or the operation thereof by the Yard Company or railroad service thereto or the conduct of the Yard Company's business would be affected the River Company shall not rearrange, remove, replace or alter existing tracks, switches,

connections, cross-overs, platforms or other facilities without in each case obtaining the consent of the Yard Company.

(b) In lieu of payment of taxes as specified in Article VI of said lease the River Company shall pay taxes and assessments upon the properties and premises therein demised in the manner and form as covenanted by it under Section 2 of Article II hereof.

(c) The River Company grants to the Yard Company, its successors, grantees, lessees and assigns during the term hereof the right, without paying any compensation therefor, at any time or times to construct, reconstruct, alter and repair, under the supervision of the River Company and to maintain, use and operate, without let or hindrance over or under the rights-of-way, railroad tracks and other properties and appurtenances herein demised, such elevated or underground passageways (including existing passageways) as the Yard Company, its successors, grantees, lessees or assigns may require in the performance of its or their business or duties, for the transfer of livestock or other personal property, or the movement of vehicles from one part of its premises to another or from its property to other properties, (subject, however, as to any passageways not now in existence, to approval by the River Company as to location, plan and specification thereof).

The River Company also grants to the Yard Company, its successors, grantees, lessees and assigns, during the term hereof, and to any subsidiary company of the Yard Com- [fol. 1085] pany or company controlled by the same interests which control the Yard Company during the period that such Company is so controlled, and thereafter, the right at any time or times without paying any compensation therefor to carry and replace under the supervision of the River Company, and to maintain, use and operate without let or hindrance cables containing wires, pipes, sewers and conduits, to furnish sewer service, water, heat, light and power or other utilities to any portion of the territory now commonly known as the Central Manufacturing District or of the Stock Yards of the Yard Company (or with the consent of the River Company to territory adjacent thereto) and to industries located in the Stock Yards or Central Manufacturing District (or with the consent of the River Company to industries in other adjacent territory) over or under the rights-of-way, railroad tracks and other prop-

erties and appurtenances herein demised, (subject to approval by the River Company as to location, plan and specification, of cables, pipes, sewers or conduits not now existing).

All structures, pipes, sewers, conduits, cables and wires herein authorized shall be constructed, maintained and operated by the party owning or controlling the same in such manner as will protect in the greatest practicable degree, in accordance with good engineering practice, the safety of the employes and properties of the River Company and will not interfere with the operation of its railroad.

The Yard Company and such other corporations or companies shall exercise the rights and privileges hereinabove granted without cost, expense or liability to the River Company and under the supervision of its engineers; and in this respect the Yard Company covenants that in the installation or construction of any new facility or the removal or replacement of any existing or new facility it will in each [fol. 1086] case restore the portion of the properties hereby demised to or owned by the River Company and disturbed in the performance of such work to their condition before the work was commenced, and will reimburse it for all cost, expense or damage to its property that it, the River Company, may incur to protect its property and consequent upon the exercise of any right or privilege hereinabove granted and that it will indemnify and save the River Company harmless against all claims of employes of the Yard Company, or of the River Company, or claims of others, or liability to the same on account of any loss, damage or injury to person or property arising from the construction, alteration, maintenance or use of said passageways, pipes, sewers, cables, wires or conduits.

If the River Company shall determine pursuant to the right in this section granted to it to rearrange, replace or alter any existing tracks, switches, connections or crossovers, or to change the location of, alter or recontruct any improvements, erections or appurtenances located upon the demised premises, or if it shall be required by law to elevate the same or any portion thereof, then the Yard Company and such other corporations or companies as shall be entitled to exercise any of the rights and privileges in this section granted to them respectively shall upon the receipt of notice in writing by the River Company, at their own expense and without cost or liability to the River Company,

and under the supervision of its engineers, make such corresponding changes in the location of their passageways or cables, wires, pipes, sewers and conduits as shall be necessary to enable the River Company to make the said alterations or changes proposed by or required of it.

Section 3: The River Company agrees to assume and to promptly and fully perform, during the term hereof, ex- [fol. 1087] cept as otherwise provided in Section 2 of Article I hereof, all obligations imposed on either the Junction Company or the Yard Company by any of the instruments or items enumerated in said Exhibit "C" hereto attached, or hereafter incurred thereby by either of said corporations in connection with the said properties or the upkeep or operation of the same, or imposed on either of said corporations or the owner from time to time of any of the properties hereby demised, by any present or future laws of the United States or of the State of Illinois or by any ordinance or regulation, present or future, of the City of Chicago, or other public body, affecting or relating to said properties, and that with respect to said properties it will promptly and fully perform and comply with all such laws, ordinances and regulations.

ARTICLE IV

Warranties and Liens:

Section 1: The Junction Company covenants that it owns in fee simple or holds by way of or under lease, easement, right of eminent domain, grant, or license or other interest or tenure giving the right to operate and use for railroad purposes all the premises and properties in this indenture demised and leased (except as otherwise shown by and in all cases subject to the items specified in said Exhibits "A," "B" or "C"); and the Yard Company covenants that it either owns in fee simple or holds by way of or under easement, right of eminent domain, grant or license, or other interest or tenure giving the right to operate and use for railroad purposes all the premises and properties comprised [fol. 1088] in the lease hold estate held by the Junction Company under said lease of December 1, 1913 and supplements thereto (except as otherwise shown by and in all cases subject to the items specified in said Exhibits "A," "B" or "C"), and each of said parties covenants that the said demised premises and properties so owned by it in fee simple

are free and clear from all liens, encumbrances, debts, contract, trackage and leasehold obligations and all other liabilities except as otherwise shown by the items mentioned in said Exhibit "C."

Section 2: The Junction Company and the Yard Company each covenants and agrees that during the term hereof it will not, except with the sanction and consent in writing of the Central Company, create or place upon the premises and properties hereby demised and leased or any portion thereof any lien, encumbrance or other obligation, and will take no corporate action, either directly or indirectly, sanctioning the creation of any such lien, encumbrance or other obligation and each agrees that if at the time of any conveyance or conveyances made pursuant to the exercise of the certain option of purchase hereinafter provided for of said premises and properties, any such lien, encumbrance or other obligation not consented to by the Central Company shall exist upon the same or any portion thereof, except those mentioned in said Exhibit "C" hereto attached, or if from any cause either the Junction Company or the Yard Company shall be unable on such exercise of said option to convey any portion of the properties or the improvements thereon hereby demised subject to said option of purchase (where such inability to convey is not caused by a limitation in an instrument or agreement mentioned in said Exhibit [fol. 1089] "C") the amount of any such lien, encumbrance or other obligation, or the value of any property or improvement which cannot be so conveyed, shall be deducted from the purchase price specified in said option of purchase herein provided for.

Section 3: The River Company hereby assumes and agrees to pay and discharge all claims, demands, rights and suits of every kind and character arising under any of said items mentioned in said Exhibit "C", the liability for which shall accrue or become fixed or determined from and after the date of this instrument, and any and all other obligations, claims, demands, rights and suits accruing after the date hereof, in respect of the tenure, operation, maintenance or use by the River Company of the premises and properties herein demised, and to forever hold the Junction Company and the Yard Company harmless from and against the same, and in respect of any obligation arising under any item enumerated in said Exhibit "C", the River Company

will also (subject to the provisions of the last sentence of this section) protect and indemnify against loss or liability any surety of either the Junction Company or the Yard Company upon any bond given to the City of Chicago in connection with the same.

The River Company further covenants and agrees to protect, indemnify and save and keep harmless the Junction Company and the Yard Company and each of them against and from any and all loss, cost, damage or expense arising from or by reason of any act or accident causing injury or damage to person or property, whomsoever or whatsoever, growing out of or in any way connected with the maintenance, use, or operation by the River Com- [fol. 1090] pany of the railroad and properties hereby demised, and against and from any loss, cost, damage or expense caused directly or indirectly by such maintenance, use, or operation.

The covenants of the River Company in this Section 3 set forth shall extend to and comprehend any claim or demand, judgment or decree, loss or expense now or hereafter incurred by either the Junction Company or the Yard Company because of any law or statute of the State of Illinois or of the United States of America making liable the Lessor or owner of any railroad for damages to person or property caused or created by the Lessee thereof. Nothing in this section contained shall be deemed to make the River Company liable on account of any expense, obligation, claim, demand, right, suit or liability now existing or hereafter arising growing out of the tenure, operation, maintenance or use of any of the premises or properties herein demised prior to entry upon the same and occupation thereof by the River Company pursuant to the provisions of this indenture, and the Junction Company hereby agrees to satisfy the same and to save harmless the River Company therefrom.

Section 4: If any suit shall be commenced against any party hereto, for or on account of any obligation, damage or injury for which any other party is solely liable within the meaning of this agreement, the party so sued shall give to the other party notice of the pendency of such suit, and thereupon such other party shall assume the defense of such suit, and shall save and hold harmless the party so sued from all loss and from all costs by reason thereof. No party

shall be concluded by any judgment against any other, unless it had reasonable notice that it was required to defend, [fol. 1091] and had reasonable opportunity to make defense. When such notice and opportunity shall have been given, the party notified shall be concluded by the judgment as to all matters which could have been litigated in such suit. Each party hereto will lend each other party hereto every reasonable assistance in the furnishing or procuring of testimony or information required in connection with any such suit or proceeding brought by or against such other party.

Article V

Condemnation, Charter Obligations, etc.

Section 1: If, at any time hereafter, during the term of this lease or of any extension thereof, the River Company shall require or desire any additional lands or other properties for railroad purposes identified with the use and occupation of the premises and properties herein demised, which, for any reason whatever, under and by virtue of the terms of its own charter, it may not condemn and which either the Junction Company or the Yard Company may, under the terms of its charter, condemn, then, in such case, the appropriate party agrees that it will at the request of the River Company, and upon receiving the amount of money required for such purpose including litigation expenses, exercise its powers of condemnation with respect to any such land or lands, and upon the acquisition thereof convey or otherwise deliver the same as may be appropriate to the River Company, and in such event the River Company covenants and agrees that it will in each case advance to the party so bringing such condemnation proceeding and before it shall be required to begin the same or incur any expense therefor, the amount of all costs and expenses of any kind or character whatsoever incurred or to be incurred by it in condemning and acquiring said land or [fol. 1092] lands. The provisions of this paragraph shall apply to any condemnation suits brought by the Junction Company now pending, which suits shall be prosecuted to a conclusion for the benefit and at the expense of the River Company.

The Junction Company and the Yard Company each further covenants that it will, at the request of the River Company, take such corporate action from time to time as

may be necessary or appropriate for the acquisition of property in the manner in this section provided for, or in any other matters incident to the organization, maintenance or operation of the premises or properties herein demised.

Section 2: The Junction Company, the Yard Company and the River Company each covenants and agrees that it will, upon the date of the expiration of its charter, take all such steps as shall be necessary to extend its corporate life from time to time in accordance with the provisions of the Statutes of the State of Illinois or any Statute of the United States in such case made and provided to the end that it will, at all times in the future, be able to maintain and perform the obligations imposed upon it under and by virtue of the terms of this demise, provided that nothing in this section contained shall be deemed to prevent any such company from consolidating with or being merged into any other corporation or corporations.

Article VI

Additions and Betterments

The River Company shall have the right, at its own expense during the term of this lease or of any extension thereof, to construct upon, erect or add to the premises and [fol. 1093] properties hereby demised and to maintain and operate for its railroad purposes any additional main tracks, side tracks, switch tracks, tracks connecting with or extending to industries, switches, connections, cross-overs and any other betterments, improvements, additions, facilities and appurtenances, and, at the termination of the term of this lease or of any extension thereof, by expiration of time, the Junction Company agrees to pay to the River Company a sum equal to the aggregate value at the date of such termination of all such tracks, betterments, improvements, additions, facilities and appurtenances. If said parties shall be unable to agree upon such value then the same shall be determined by arbitration pursuant to and in the manner provided for under Article XIII hereof.

Article VII

Accounting

Each party hereto shall have the right, at proper times and places and under proper supervision, to inspect such

books of account, vouchers, records and files of any of the other parties hereto as may be necessary to determine the amount from time to time properly apportionable to the demised premises on account of taxes pursuant to the provisions of Section 2 of Article II hereof, or the cost or value of any addition, betterment or improvement, or any other item of expenditure or matter involved at any time in accounting between any of the parties hereto pursuant to the provisions hereof.

[fol. 1094] ARTICLE VIII

Covenants of Quiet Enjoyment

The Junction Company covenants, in respect of all the premises and properties herein demised, and the Yard Company covenants, in respect of all of the premises and properties demised by said indenture of lease of the first day of December, A. D. 1913, and supplements thereto, that the River Company, its successors and assigns, upon paying the rents and sums herein reserved and performing and fulfilling all and singular the covenants and agreements herein contained on its part to be performed and fulfilled shall and may peacefully and quietly have, hold and enjoy the premises and properties herein demised and leased for and during the term hereof (subject, however, as above set forth) without any let, hindrance or molestation on the part of the Junction Company or of the Yard Company, or of any other person or persons, corporation or corporations whatsoever claiming by, from, through or under them or either of them.

ARTICLE IX

Guarantee by the Central Company of the Performance by the River Company of the Terms of this Indenture

The Central Company hereby guarantees the prompt and full payment by the River Company, in manner and form as herein provided, of the rentals herein reserved and all taxes and other sums herein provided to be paid by the River Company and the prompt and full observance and performance by the River Company of all and singular the covenants, conditions and agreements herein contained on its part to be observed and performed.

[fol. 1095] ARTICLE X

Covenant to Maintain Properties and Equipment and Return Same at end of Lease

The River Company covenants that it will maintain the premises and properties (including all equipment) by this instrument demised, in good operatable condition and repair and from time to time renew and replace the improvements thereon and the said equipment or make equivalent substitution therefor and, at the termination of the term of this lease, or of any extension thereof, whether by expiration or otherwise, except in the instance of expiration resulting from or arising by the exercise of the option of purchase provided for in Article XII hereof, will deliver and return the same to the Junction Company in as good order and condition as when received, ordinary wear and tear (with reasonable care and reasonable renewals and replacements) excepted; provided that the River Company shall not be required to account for or to return to the Junction Company the certain fourteen (14) locomotives subject to the Equipment Trust agreement dated January 15th, 1920, made between the Junction Company, the Director General of Railroads and Guaranty Trust Company of New York, Trustee, described in Subdivision II of said Exhibit "C" under the title of "Equipment Obligations". The Junction Company in consideration of these premises and of the sum of One Dollar ($1), receipt whereof is hereby acknowledged, does hereby assign, sell, set over, transfer and deliver to the River Company said fourteen locomotives last mentioned, each and every of them subject to the terms and provisions of said Equipment Trust agreement dated January 15th, 1920, and the River Company [fol. 1096] hereby assumes all payments thereby required still to be made and the further performance of all of the terms, covenants and conditions of said agreement and agrees to indemnify and save harmless the Junction Company therefrom.

ARTICLE XI

Forfeiture

The River Company and the Central Company severally covenant and agree that if the River Company shall at any time hereafter during the term of this lease or demise

fail or omit to pay the rent herein reserved or any part of such rent when the same shall be due, as herein provided, or shall fail or omit to keep and perform all of the covenants and agreements herein contained, by it to be kept and performed, or any of them (other than the agreements of Article XIX hereof) then the Junction Company may notify the River Company and the Central Company in writing of such default, and if such default shall continue for a period of ninety (90) days after the service of such notice then, and in either and every such case, it shall be lawful for the Junction Company, at its option, without further notice or demand, the same being hereby waived, to declare the term hereof ended and this lease terminated and cancelled, and to enter into and upon the premises and appurtenances herein demised, and every part thereof, and remove all persons therefrom without let or hindrance and thenceforth such demised premises and property and all additions and improvements which shall have been made to the same to have, hold, possess and enjoy as in the first and former estate of the Junction Company in the said. [fol. 1097] premises and property, with the right to collect the rentals then due; provided, however, that if there shall be involved a question of the existence of such default entitling the River Company to demand arbitration thereof pursuant to the provisions of Article XIII of this Indenture and if, prior to the end of such period of ninety (90) days after the service of notice of default under this Article, written notice shall have been given by the River Company to the Junction Company of the River Company's desire to arbitrate such question, all in accordance with the provisions of Article XIII, then the question of the existence or non-existence of such default shall be determined by arbitrators under the provisions of said Article XIII. If the arbitrators find that the default exists and if in that event the default be not remedied within thirty (30) days after such determination by the arbitrators, the Junction Company may, without further notice or demand, exercise and enforce all of the rights and penalties provided under this Article XI for cases of default. In the event of the termination of this lease under the provisions of this Article XI all improvements placed on or made to said premises or properties by the River Company shall remain and shall become and be the property of the Junction Company without payment of compensation therefor,

and the River Company shall also transfer, assign, convey and quitclaim to the Junction Company all easements, grants, trackage rights and ordinance rights by this lease transferred and assigned to the River Company. The Junction Company however, may take such other and further action for the enforcement of the provisions of this instrument as to the said Junction Company may seem advisable; and the River Company and any other person, firm or corporation in or upon the same to expel and put out, using such force as may be necessary; but all remedies, [fol. 1098] whether at law or in equity, or by this instrument reserved, to be always construed as being cumulative, and no one remedy as a bar upon or to the exercise of any other remedy.

Any re-entry by the Junction Company of the demised premises or the exercise by it of any other remedy under the provisions of this Article shall be without prejudice to the enforcement by it of any right or remedy against the Central Company derived under the provisions of Article IX hereof.

The River Company and the Central Company severally covenant that if default as in this article defined shall be made by the River Company and if default shall likewise be made by the Central Company in its covenant of guarantee in Article IX hereof contained and the term hereof be ended and this lease be terminated and cancelled, and re-entry into and upon the premises hereby demised be effected, all pursuant to the provisions of this article, then, at the option of the Junction Company the River Company will sell, assign, transfer, convey and quit claim to the Junction Company, or to such party as it shall designate all the railroad properties, real or personal, and appurtenances owned as of the date hereof by the River Company, including all its right, title and interest in any then existing leases, easements, grants, trackage rights, licenses and other interests, or any extensions of the same, enumerated in Exhibit "A" attached to the said agreement made September 27, 1920, between The Chicago Junction Railways and Union Stock Yards Company and the Central Company, free and clear of all liens and encumbrances, but subject, however, to the several obligations, or any extensions thereof, in said Exhibit "A" enumerated, and also subject [fol. 1099] to the certain mortgage of October 1, 1911, and supplemental agreement of July 1st, 1915, therein referred

to, made by the River Company to the Merchants Loan and Trust Company, Trustee, securing an issue of First Mortgage 5% Gold Bonds aggregating Seven hundred and sixty-five thousand dollars ($765,000), and maturing October 1st, 1925, and upon payment of the same to any subsequent mortgage or other encumbrance securing an issue of bonds not in excess of said amount. Nothing in this paragraph contained shall be deemed to prevent the River Company from conveying away or otherwise disposing of free and clear from the option in this Article granted such parcels of land as shall no longer be required in the operation of its railroad properties and the disposition of which will not destroy the continuity of its lines of railroad as they now exist.

The purchase price for said properties under the next preceding paragraph of this Article shall be a sum equivalent to the total fair market value thereof at the time of the exercise of said option less the amount of any encumbrances existing thereon, and in the event that the parties shall be unable to agree upon the amount of said purchase price the same shall be determined by arbitration in the manner provided for by Article XIII hereof.

In event of the exercise of said option in this Article granted, the River Company will join with the Junction Company in making application for authority to make the conveyances herein provided for to such governmental bodies as shall have jurisdiction in the premises and will take such other corporate action as shall be essential to effect the same.

[fol. 1100] ARTICLE XII

Grant to the Central Company of an Option to Purchase Demised Properties:

The Junction Company and the Yard Company hereby severally covenant and agree that subject to the approval pursuant to law of the Interstate Commerce Commission or of such other public authority, State or Federal, as may have jurisdiction in the premises, the Central Company, its successors and assigns, shall, at its or their option, to be exercised at any time during the term of this lease or of any extension thereof, have the right to purchase and ac-

quire all of the right, title and interest of the Junction Company and the Yard Company in the properties and appurtenances real and personal by this indenture demised and leased or assigned, or transferred (including all the premises and properties leased by the Yard Company to the Junction Company under the said lease dated December 1, 1913, and leases supplemental thereto mentioned in item (2) of Section 1 of Article I hereof, but not including the interests of the Yard Company in any properties held by the Junction Company under other leases from the Yard Company), intending hereby to grant to the Central Company, its successors and assigns, an option to purchase and acquire for the price and upon the terms and conditions hereinafter specified all the right, title and reversionary interest of the Junction Company in all of the premises, properties and other interests hereby demised and all the right, title and reversionary interest of the Yard Company in and to the premises and property demised by said lease of December 1, 1913, and/or any and all supplements thereto. The price therefor shall be [fol. 1101] the sum of thirty-three million, three hundred and thirty-three thousand, three hundred and thirty-three dollars ($33,333,333.) payable in cash or in such securities as the Junction Company, the Yard Company and the Central Company shall agree upon. The Central Company shall give to each the Junction Company and the Yard Company sixty (60) days' notice in writing of its intention to exercise the option herein provided for, and the Junction Company and the Yard Company hereby severally covenant and agree that upon receipt of said notice and the approval of the public authorities whose approval is required by law each will, at the termination of said sixty (60) days and upon receipt by it of its portion of said purchase price, as hereinafter stipulated, execute and deliver to the Central Company or to its nominee such deeds and other instruments as will effectively convey to the Central Company or to its nominee all their respective right, title and interest in and to the premises, properties and interests above described to be so purchased, such deeds or other instruments to contain full covenants of general warranty with respect to any properties now owned by said companies respectively in fee simple, and covenants of special warranty as to all other properties. The Junction Company and the Yard Company further severally covenant that the properties

to be so conveyed shall be free and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "C" hereto attached, or shall hereafter be created or placed upon the same by the River Company or the Central Company, or with the consent in writing of either of these last named parties, (the Central Company to take the same subject thereto and to this lease), and if at the time of the conveyance of said properties any [fol. 1102] liens, encumbrances or other obligations shall exist upon the same except as specified above, or if for any cause either the Junction Company or the Yard Company shall be unable to convey any as aforesaid portion of said properties or of improvements thereon subject to the option of purchase in this Article XII provided for, (where such inability is not caused by limitation in an instrument or agreement mentioned in said Exhibit C), the amount of any such lien, encumbrance or other obligation, or the value of any property or improvement which cannot be so conveyed, shall be deducted from the purchase price herein provided for.

The Central Company shall by covenants in such instruments of conveyance contained assume or agree to perform all obligations imposed on either the Yard Company or the Junction Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit "C" or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said properties or imposed upon either of said corporations by any ordinance, regulation or requirement, present or future, affecting or relating to said properties, of the City of Chicago, or other public body, or by any law of the United States or of the State of Illinois.

The Central Company shall pay of said purchase price twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516.) to the Junction Company and ten million, three hundred and forty-five thousand, eight hundred and seventeen dollars ($10,345,817.) to the Yard Company.

[fol. 1103] The Junction Company and the Yard Company hereby further covenant and agree that each will take such corporate action as may be necessary and appropriate to make effective the conveyances and transfers in this Article provided for.

Article XIII

Arbitration Clause:

If at any time during the term hereof a question shall arise between the Junction Company and the Yard Company, or either of them, on the one part and the River Company and the Central Company, or either of them, on the other part, concerning the construction of any part of this indenture, or concerning the observance or performance of any of the covenants, obligations or conditions herein contained, upon which question such parties cannot agree, such question shall be submitted to the arbitrament of three disinterested persons, to be chosen one by each party to such controversy and one by the two so chosen. The party or parties desiring such arbitration shall give written notice thereof to the other party or parties and shall in such notice name the arbitrator selected by the party or parties giving such notice and state precisely the matter or matters which it is proposed to bring before the arbitrators. The other party or parties shall within ten (10) days after receipt of such notice name its or their arbitrator to the party or parties which gave the notice, and may also state matters to be then arbitrated, such notification and statement also to be in writing. Only matters so stated by the parties shall be considered or decided by the arbitrators. If the party or parties to whom such first notice [fol. 1104] is given shall fail to name an arbitrator and notify the other party or parties thereof within ten (10) days after notice to it, as aforesaid, the party or parties giving such first notice may apply to that Judge of the District Court of the United States of America for the District which shall then include the City of Chicago, Illinois, who is then senior in office, and he after reasonable notice to the other party or parties shall name and appoint an arbitrator for and in behalf of the party or parties so in default, and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party or parties. If the two arbitrators chosen as above provided shall fail to select a third arbitrator within ten (10) days after the selection of the second arbitrator as aforesaid, such third arbitrator may be appointed (after ten (10) days' previous notice by either party to said controversy to the other party thereto of intention

to make application therefor) by the Judge then senior in office of the District Court of the United States for the District which shall then include the City of Chicago, Illinois. The arbitrators so selected shall as soon as possible after their selection meet to hear and decide the questions submitted to them and shall give to each side of the controversy reasonable notice in writing of the time and place of such hearing. After hearing both parties to the controversy and taking such testimony and making such further investigation as they may deem necessary, they shall make in writing their award upon the question or questions so submitted to them and shall serve a copy of such award upon each of the parties to the controversy, and the written award signed by such arbitrators or a majority of them and so served shall be final and binding upon the parties to the controversy and each shall promptly conform thereto. [fol. 1105] The books and papers of all parties to the controversy, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrators. Each side to the controversy shall pay the fees of its own arbitrator, and the fees of the third arbitrator and all other expenses shall be apportioned equally between the respective parties to the controversy. Until the arbitrators shall make their award upon questions submitted to them, the business, settlements and payments to be transacted and made under this indenture shall continue to be transacted and made in the manner and form existing prior to the arising of such questions. The provisions of this Article shall have application in respect of all the premises and properties herein demised and where applicable shall apply in lieu of Article X of said lease dated December 1, 1913.

Article XIV

Yard Company Joining

The Yard Company hereby consents to and ratifies the foregoing lease, including the option of extension and purchase therein contained.

Article XV

Notices

Any notice to be served hereunder on either the Junction Company or the Yard Company may be served on them

respectively by delivering a copy thereof to any officer of such companies, respectively, or by mailing a copy thereof by United States registered mail, postage prepaid, ad- [fol. 1106] dressed to such companies respectively at such place as such companies, respectively, may from time to time in writing designate for said purposes to the other parties hereto, or in the absence of such designation then at Chicago, Illinois. Any notice to be served hereunder on either the River Company or the Central Company may be served on them respectively, by delivering a copy thereof in writing to any officer of said companies, respectively, or by mailing a copy thereof by United States registered mail, postage prepaid, in the case of the River Company addressed to it at Chicago, Illinois, and in the case of the Central Company addressed to it at New York City, New York; provided, however, that either of such last named companies, respectively, may from time to time specify in writing to the other parties hereto some other address to be used in mailing such notice and if it does so, the address so specified by it shall be used for such purpose.

Article XVI

Extension of Lease

The River Company its successors or assigns shall have the right to extend this lease in perpetuity on all the same terms and conditions as herein set forth provided that it shall, not less than one (1) year prior to the end of the term hereof, have served on the Junction Company and the Yard Company or their respective successors, grantees or assigns (being the owners at such time of the interests in the property hereby demised which is now owned by the Junction Company and the Yard Company, respectively), notice in writing of its election so to do, and in case of and after the [fol. 1107] service of such notice this lease shall be regarded as extended ipso facto in perpetuity, subject to all the provisions, limitations and conditions herein contained.

Article XVII

Relating to Successors, Assigns and Sub-Lessees:

The River Company shall have the right at any time or times to assign its leasehold estate hereunder as to the

properties hereby demised or any portion thereof, or to sublet all or any part of said properties, subject always to the provisions and obligations hereof, and provided that any such assignment or subletting shall not relieve the River Company or the Central Company of their respective obligations hereunder, and this indenture and all the covenants and agreements hereof shall inure to the benefit of and be binding upon the respective successors, assigns, purchasers, grantees, sub-lessees and licensees of the parties hereto and the provisions herein shall always and irrevocably be held to be covenants running with the land and to bind all persons, firms and corporations taking the premises herein described, or any part thereof, by, through or under the parties hereto, or any of them.

Article XVIII

Inventory of Personal Property

An inventory and appraisal of all of the personal property hereby demised shall be made as of the date hereof by representatives of the several parties hereto, or in case of disagreement as to any item or items by an independent party to be selected by them; such inventory and appraisal authenticated by the appropriate officer of each party, shall [fol. 1108] be made in quadruplicate and an original furnished to each party, and shall be evidence as to the nature, value and condition of the property in all cases in which any question of such nature, value or condition may arise. At the termination of the term of this lease, or of any extension thereof, whether by expiration or otherwise, except in the instance of expiration resulting from or arising after the exercise of the option of purchase provided for in Article XII hereof, the River Company will return to the Junction Company, or deliver to it in lieu of the personal property set out in the inventory in this Article provided to be made, the same or other personal property of similar character and equal value and appropriate for the operation of the railroad properties herein demised.

Article XIX

Acceptance

The River Company accepts the leaseholds, grants, licenses and other rights and interests herein demised, assigned

or transferred on the terms and conditions herein specified and on its part covenants to keep and perform the same.

The River Company agrees that it will be its policy to co-operate promptly and fully in the development of the Central Manufacturing District and all other industrial territory located on or contiguous to its tracks and to continue to permit the uninterrupted flow of traffic to and from all roads and to continue and improve carload and less-than-carload service and facilities enjoyed by industries located on the tracks of the Junction Company and the River Company, all without discrimination as to routing.

[fols. 1109-1194] In Witness Whereof, the parties hereto have caused these presents to be executed in quadruplicate by their respective Presidents or Vice Presidents and their corporate seals to be hereunto affixed and attested by their respective secretaries, such action of said officers severally being duly authorized by the respective Boards of Directors of the parties hereto, all as of the day and year first above written.

The Chicago Junction Railway Company, By R. Fitzgerald, President.

(Corporate Seal.)

Attest: F. L. S. Harman, Asst. Secretary.

The Union Stock Yard and Transit Company of Chicago, By A. G. Leonard, President.

(Corporate Seal.)

Attest: F. L. S. Harman, Secretary.

The Chicago River and Indiana Railroad Company, By R. Fitzgerald, President.

(Corporate Seal.)

Attest: A. E. Rawson, Secretary.

R. J. C. The New York Central Railroad Company, By A. H. Smith, President.

(Corporate Seal.)

Attest: E. F. Stephenson, Secretary.

[fol. 1195] EXHIBIT D

Lease from Union Stock Yard and Transit Company of Chicago to Chicago Railway Company

Dated December 1, 1913

This Indenture, Made and entered into this First day of December, A. D. 1913, by and between The Union Stock Yard and Transit Company of Chicago (hereinafter for convenience called the "Yards"), party of the first part, and the Chicago Junction Railway Company (hereinafter for convenience called the "Junction Company"), party of the second part,

Witnesseth:

That whereas, the parties hereto are severally corporations, created and existing under and by virtue of the laws of the State of Illinois, and are severally possessed of lines of railroad, and have power under the laws of the State of Illinois, the Yards to grant and demise its right-of-way, line of railroad and railroad track and equipment, and the Junction Company to take and operate the same; and

Whereas, heretofore, to-wit, on the 15th day of December, A. D. 1897, the Yards entered into a certain Indenture of Lease with that certain corporation then known as the Chicago & Indiana State Line Railway Company, which said [fol. 1196] Lease is hereby referred to and made a part hereof and attached hereto as Exhibit A; and

Whereas, the Junction Company is the successor of the said Chicago & Indiana State Line Railway Company and is now in possession, as successor under said Lease, of all the line of railroad, right-of-way and railroad tracks demised by said above mentioned Indenture, dated the 15th day of December, A. D. 1897, and is also in possession of certain additional property thereafter acquired by the Yards, and leased by it to the said Junction Company, and is also in possession of and the owner of certain additional property acquired and purchased by it, the said Junction Company; and

Whereas, it is the desire and wish of the above said Yards and the Junction Company to modify said above mentioned Indenture of December 15th, A. D. 1897;

Now, therefore, in consideration of the premises and of one dollar ($1.00) by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements and undertakings hereinafter recited by each of the parties hereto severally to be kept and performed, it is hereby mutually covenanted and agreed as follows:

Article I. Said Indenture of Lease dated December 15th, A. D. 1897, by and between the Yards and the Chicago & Indiana State Line Railway Company is hereby cancelled as of November 30th, 1913, and shall thenceforth be held for naught.

Article II. The Yards does hereby grant, demise and lease unto the Junction Company in perpetuity after the date hereof, the line of railroad and railroad tracks of the Yards, extending from its connection with the tracks of the Illinois Central Railroad Company at or near the shore of [fol. 1197] Lake Michigan and Forty-third street in the City of Chicago, and thence in a general westerly and northerly direction to its terminus in Section nineteen (19), Township thirty-nine (39) North, Range fourteen (14) East of the Third Principal Meridian, in the City of Chicago, together with all side tracks, industrial tracks, switches, turn-outs, cross-overs, appurtenances, railroad yards, yard tracks, storage yards and tracks, repair tracks, roundhouse tracks, machine shop tracks, and generally all and singular the right of way, railroad and railroad tracks and appurtenances of the Yards wherever situate and for what purposes soever the same are used and however held or possessed; and also all other railroad tracks and property now owned by the Yards and in the possession of and operated by the Junction Company wheresoever situated and for whatsoever purpose the same are used and however held and possessed, excepting, however, the railroad tracks in the amphitheater building, and excepting the tracks on the premises described in Exhibit "B" attached hereto and made a part hereof.

The Yards does also hereby grant, demise and lease unto the Junction Company in perpetuity after the date hereof, all and singular the roundhouse, repair shops, machine shops, coal chutes, signal houses, telegraph offices, storage houses and places, and the lands upon which the same are built or now used and maintained thereon or held therefor, situate in the City of Chicago, and also all those buildings,

or parts of buildings, erections, ways and places now or heretofore owned by the Yards and now in the possession of and used by the Junction Company in carrying on and conducting its railroad business or held therefor; saving and excepting however, the space occupied by the said Junction Company as and for its offices in the following described premises, to-wit: Room 168 Exchange Building; room and vault 339 Exchange Building; telegraph office in the South office building; quarters in the Administration Building of [fol. 1198] the Yards; store room at the Yards and the offices occupied by the Auditor, Treasurer, Registrar; and the office used as a stationery room.

Also, all and singular the locomotives, cars, hand cars, tools, machinery, fixed and movable, and all and singular all other instrumentalities now and prior to the execution and delivery of this instrument owned by the Yards and now used by the Junction Company in operating or carrying on and conducting its railroad business; also, the telegraph line or lines, poles, wires, instruments and appurtenances owned and possessed by the yards and now used by the Junction Company in carrying on and conducting its railroad business, with the right to enlarge and extend the same, and, so far as may be necessary, convenient or proper to erect upon the lands of the Yards additional poles, wires and other instrumentalities necessary or useful in and about the maintenance and operation of the telegraph line or lines of said railroad. The Yards reserves the right, however, to erect upon the premises and right of way hereby demised such electric light lines, conduits for electrical conductors, telephone lines and other electrical lines, as may be necessary or convenient now or hereafter for the transaction of the business of the Yards, provided, however, that such electric light lines, telephone lines and other electrical lines shall always be so constructed as not to interfere with or endanger the operation of the trains and cars and railroad business of the Junction Company.

Also, the right to lay down, maintain and operate upon the lands of the Yards additional side tracks, switch tracks, industrial tracks, switches, connections, cross-overs, and appurtenances thereof, necessary to reach industrial plants now or hereafter erected; with the right to rearrange, remove, and replace existing yards, side tracks, switch tracks, industrial tracks, switches, connections, and cross-overs, and the same to change, alter and renew at pleasure, and

the right to erect such depots and stations as may be reasonable and necessary:

[fol. 1199] Together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, with the right, power and authority solely in the Junction Company to operate cars, engines, and trains upon, over, and along the railroad tracks and facilities by this instrument demised, and thereon to pursue the business of a common carrier at and for such tolls, rates, charges and revenues as the Junction Company may from time to time impose, collect and receive; provided, however, the same shall be reasonable.

To have and to hold the above-described premises and property, with the rights, privileges, easements, and appurtenances thereunto attaching and belonging unto the Junction Company for and during the period and term aforesaid; the Junction Company yielding and paying therefor unto the Yards the rental hereinafter provided, and faithfully complying with all and singular the terms and conditions upon which the demise herein contained is made.

Article III. The Yards does hereby assign, transfer and set over and vest in the Junction Company, all the right, title and interest of the Yards in and to all and singular the agreements, contracts or undertakings heretofore assigned, transferred and set over unto the Chicago & Indiana State Line Railway Company under and by virtue of Article 2 of said Indenture of December 15th, 1897, including all leases, agreements and writings in and by which or upon the terms of which the Yards now holds or owns any part of or portion of its right of way or railroad tracks and appurtenances.

Article IV. The Junction Company covenants and agrees,—

(a) That it will, at its own sole cost and expense, keep and maintain the premises and property by this instrument demised in as good order and condition as the same are at [fol. 1200] the delivery of this instrument, and the same from time to time will renew, repair and replace.

(b) That the Junction Company will conduct, operate and manage, at its own sole cost and expense, the premises and property by this instrument demised in a proper manner, and in such a way as to enable trains easily and conveniently to approach the stock and cattle yards and appurte-

nances of the Yards, and as will secure the prompt handling and dispatch of all business that may be offered upon said line of railroad and appurtenances, or consigned to or from said Yards, and will at all times hold itself in readiness to meet the demands of business offering to, or passing upon, over and along the said demised tracks or contiguous thereto.

(c) That the Junction Company will at the times and in the manner hereinafter mentioned promptly pay the rental by this instrument reserved to be by the Junction Company paid to the Yards.

(d) That the Junction Company will at all times hold itself in readiness to do, and will do and perform, the duties pertaining to a railroad, or of a railroad character, imposed upon or required by its charter or by the act of incorporation of the Yards to be done and performed by the Yards.

Article V. The rental to be paid by the Junction Company for the premises and property by this instrument demised, shall be the sum of six hundred thousand dollars ($600,000) per year in perpetuity, payable in monthly installments, on the first day of each and every month, beginning with the first day of December, 1913, of fifty thousand dollars.

If the Junction Company shall exercise the right conferred upon it under Article 2 of this demise, to lay down, maintain and operate upon the lands of the Yards, additional side tracks, switch tracks, and industrial tracks, switches, connections, cross-overs and appurtenances, and shall by reason thereof acquire for its use any substantial [fol. 1201] portion of the remaining property of the Yards, then the Junction Company shall pay an additional rental to the Yards for the use of such additional lands; said additional rental to be agreed upon by the parties at the time of the taking of such additional property, or if the same shall not be agreed upon by the parties, then to be determined by arbitration as hereinafter provided.

Upon the payment by the Junction Company to the Yards of such sums of money as are on December 1, 1913, shown by the books of the Junction Company to be due to the Yards, as rent under the lease dated December 15, 1897, then all obligations for any additional rental under the terms of said last mentioned lease are hereby released by the Yards to the Junction Company and each of the companies hereto

hereby gives and grants unto the other a full and complete release, discharge and satisfaction of any claim of any kind or character whatsoever which either of the two companies may have against the other under and by virtue of the terms of said last mentioned lease or growing out of the same or in anywise connected therewith, including such claims, if any, as the Yards might have in any sum or sums now set up on the books of the Junction Company as a reserve account; Provided, however, that nothing herein contained shall release the Junction Company from the obligation imposed by Article VII of this demise.

Article VI. The Junction Company covenants and agrees to take the premises and property in this lease described, for the term and upon the conditions herein expressed, and the same to operate and conduct in the manner above in Article 4 described, at its own sole cost and expense, and the rental herein reserved to pay or cause to be paid at the times and in the manner in Article V mentioned and described; further, to operate and conduct said line of railroad in a proper and thorough manner; to pay all taxes, assessments, and impositions levied, assessed or imposed by state, city or [fol. 1202] other municipal authority, or by the Government of the United States, upon its traffic, business, or income; to accept assignment and transfer of the agreements, contracts, and undertakings in Article III, prescribed, and the same to complete, carry out, and perform as in and by said agreements, contracts, and undertakings the Yards has covenanted and agreed; to conduct, manage, and operate the line of railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards; and that it will properly maintain the premises and property by this instrument demised, and the same renew, replace and repair.

Article VII. The Junction Company will pay and discharge all claims, demands, rights, suit or suits, the liability for which shall accrue or become fixed and determined from and after the date of this instrument, or prior thereto, with respect to the operation or use of the property hereby demised, and forever hold the Yards harmless from and against the same. This covenant of the Junction Company shall extend to, and comprehend any claim or demand, judgment or decree, loss or expense now or hereafter incurred by the Yards, because of any law or statute of the State of

Illinois, making liable the lessor or owner of the track on which the liability may accrue.

Article VIII. If, at any time hereafter, during the term of this demise, the Junction Company shall require or desire any additional land for railroad purposes, which for any reason whatsoever under and by virtue of the terms of its own charter, it may not condemn, and which the Yards may, under the terms of its charter, condemn, the Yards covenants and agrees that it will, at the request of the Junction Company, exercise its powers of condemnation with respect to such land or lands and deliver the same upon the acquisition thereof to the Junction Company, and in such event, the [fol. 1203] Junction Company covenants and agrees that it will reimburse the Yards for all expenses of any kind or character whatsoever incurred by the Yards in condemning and acquiring said land or lands.

Article IX. The Junction Company covenants and agrees that it will, upon the date of the expiration of its charter, extend its corporate life from time to time in accordance with the provisions of the statutes of the State of Illinois in such case made and provided, so that it will at all times in the future, be able to maintain and perform the obligations imposed upon it under and by virtue of this demise.

Article X. It is mutually agreed between the parties hereto, that if, at any time hereafter, any disagreement shall arise between the parties hereto as to the construction of any of the Articles of this Agreement, or as to the amount of additional rental to be paid, in the event any substantial additional property or properties of the Yards are taken by the Junction Company, as provided for in this demise, and which said disagreement cannot be adjusted and settled between the respective officers of the two parties hereto; or in case any question shall hereafter arise between the parties hereto, as to the nonfulfillment of any of the agreements or covenants herein contained, to be kept either by the Yards or by the Junction Company, then and in all such cases, the questions so arising shall be submitted to the arbitration of two disinterested persons, skilled in the business of conducting and managing railroads, one of whom shall be chosen by each of the parties hereto and the said arbitrators so chosen, shall have authority and power to make a final decision and adjustment of such questions, and their decision when so made, shall be final and conclusive of the matters and things so determined.

In the event either of the parties hereto shall, within ten (10) days after notice in writing from the other party of its [fol. 1204] desire to arbitrate any difference or differences arising under this agreement, fail to appoint an arbitrator, as provided for by this Article, then and in that case, the person selected by the other party as its arbitrator, shall be authorized and empowered to act upon and determine the questions or differences between the two parties mentioned in said notice and his decision of the question or questions submitted to him shall be final and conclusive between the parties hereto.

It is further mutually agreed between the parties hereto, that in case the two arbitrators so chosen as aforesaid, shall fail to agree upon the adjustment of the question or questions so submitted to them as aforesaid, then and in such case, the two arbitrators, shall choose a third arbitrator, who shall be a disinterested person, skilled in the conduct of railroads, and the award of such third arbitrator so chosen when made, shall be conclusive upon both of the parties hereto as to the question or questions decided by such arbitrator.

It is further agreed between the parties hereto, that in case the arbitrators chosen by the parties hereto, shall, within ten days after any disagreement upon any question or questions submitted to them, as provided herein, fail to select a third arbitrator, then and in that case, each of the parties hereto shall name a person, and from the two persons so named, a third arbitrator shall be selected by drawing lots, who shall have like power and authority, and whose decision shall be equally binding upon the parties hereto, as though he had been selected by the arbitrators in the manner hereinbefore provided for.

It is further mutually agreed between the parties hereto, that if, at any time, either of said parties, after ten days' notice in writing so to do, shall fail to name a third arbitrator to be selected by lot, in the manner hereinbefore provided for, then and in that case, the person selected by the other party shall be authorized and empowered to act as such third arbitrator, and his decision of the question or questions submitted to him shall be final and conclusive between the parties hereto.

[fol. 1205] Article XI. This agreement shall inure to the benefit of and be binding upon the successors, assigns, purchasers, sub-lessees and licensees of the parties hereto, and

the provisions herein shall always and irrevocably be held to be covenants running with the land and to bind all persons, firms and corporations taking the premises herein described, or any part thereof, by, through, or under the parties hereto, or either of them.

In witness whereof, the parties hereto have caused these presents to be executed by their respective presidents and their corporate seals to be hereunto affixed, and attested by their respective secretaries, the action of said presidents and said secretaries severally being thereto duly authorized by the respective boards of directors of the parties hereto, the day and year first above written.

The Union Stock Yard and Transit Company of Chicago, By A. G. Leonard, President.

(Corporate Seal.)

Attest: H. E. Poronto, Secretary.

Chicago Junction Railway Company, By R. Fitzgerald, President.

(Corporate Seal.)

Attest: S. A. Bracken, Assistant Secretary.

[fol. 1206] Agreement Designated as Exhibit "A" in and attached to the Foregoing Lease of December 1, 1913

An Agreement made and concluded this fifteenth (15th) day of December, A. D. 1897, by and between The Union Stock Yard and Transit Company of Chicago (hereinafter for convenience called the "Yards"), party of the first part, and the Chicago and Indiana State Line Railway Company (hereinafter for convenience called the "Railroad"), party of the second part, bears witness:

Whereas, the parties hereto are severally corporations created and existing under and by virtue of the laws of the State of Illinois and are severally possessed of lines of railroad, and have power under the laws of the State of Illinois, the Yards to grant and demise its right of way, line of railroad, and railroad tracks, and the Railroad the same to take and operate:

And whereas, at a meeting of the board of directors of the Yards held on the fourteenth (14th) day of December, A. D. 1897, it was resolved to enter into, execute and deliver

a certain agreement of demise and lease of its line of railroad and railroad tracks unto the Railroad, being this instrument, and thereafter the board of directors of the Railroad, at a meeting called and held on the seventeenth (17) day of December, A. D. 1897, resolved to take and accept said lease and demise upon the terms and conditions of said grant and the undertakings, covenants and agreements therein expressed to keep and perform;

And whereas, the Railroad has entered into negotiations with the Chicago, Hammond and Western Railroad Company for consolidation with said company or for the acquisition of all and singular the line of railroad, tracks, yards, [fol. 1207] cars, locomotives, tools, machinery and other instrumentalities of said Chicago, Hammond and Western Railroad Company, with the purpose and object of extending, by the acquisition thereof, the lines of railroad of the said Chicago and Indiana State Line Railroad Company. Said Chicago, Hammond and Western Railroad Company will hereafter be referred to as the "Chicago Company."

And whereas, the acquisition by the Railroad of the railroad tracks and property by this instrument demised, and of the line of railroad, property and facilities of the Chicago Company to be acquired by the Railroad, by consolidation or otherwise, and the performance by the Railroad of the covenants in this instrument contained by it to be kept and performed, to enable trains easily and conveniently to approach the stock and cattle yards and appurtenances of the Yards, will enhance the facilities of the public for doing business at the plant of the Yards, and will the better secure to the Yards its business and prompt handling and dispatch of the same;

Now, therefore, in consideration of the premises and one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants, undertakings and agreements hereinafter recited, by each of the parties hereto severally to be kept and performed, it is hereby mutually covenanted and agreed as follows:

Article I. The Yards does hereby grant, demise and lease unto the Railroad, for the terms of fifty years next ensuing after the date hereof, the line of railroad and railroad tracks of the Yards, extending from its connection with the tracks of the Illinois Central Railroad Company at or near the shore of Lake Michigan and Forty-third

street in the city of Chicago, and thence in a general westerly and northerly direction to its terminus in section 19, town- [fol. 1208] ship 39 N., R. 14 east of the Third Principal Merid-an, in the city of Chicago, together with all side tracks, industrial tracks, switches, turnouts, cross-overs, appurtenances, railroad yards, yard tracks, storage yards and tracks, repair tracks, roundhouse tracks, machine shop tracks, and generally all and singular the right of way, railroad and railroad tracks and appurtenances of the Yards wherever situate and for what purpose soever the same are used and however held or possessed:

Also, all and singular the roundhouse, repair shops, machine shops, coal chutes, signal houses, telegraph offices, storage houses and places, and the lands upon which the same are built or now used and maintained thereon or held therefor, situate in the City of Chicago, and being generally all those buildings, erections, ways and places now or heretofore used by the Yards in carrying on and conducting its railroad business or held therefor;

Also, all and singular the locomotives, cars, handcars, tools, machinery, fixed and movable, and all and singular all other instrumentalities now and prior to the execution and delivery of this instrument used by the Yards in operating or carrying on and conducting its railroad business; also, the telegraph line or lines, poles, wires, instruments and appurtenances now owned, possessed or used by the Yards in carrying on and conducting its railroad business, with the right to enlarge and extend the same, and, so far as may be necessary, convenient or proper, to erect upon the lands of the Yards additional poles, wires and other instrumentalities necessary or useful in and about the maintenance and operation of the telegraph line or lines of said railroad;

Also, the right to lay down, maintain and operate upon the lands of the Yards additional sidetracks, switch tracks, industrial tracks, switches, connections, cross-overs and appurtenances thereof, necessary to reach industrial plants now or hereafter erected; with the right to rearrange, remove and replace existing yards, side tracks, switch tracks, [fol. 1209] industrial tracks, switches, connections and cross-overs, and the same to change, alter and renew at pleasure, and the right to erect such depots and stations as may be reasonable and necessary;

Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, with the right, power and authority solely in the Railroad to operate cars, engines and trains upon, over and along the railroad tracks and facilities by this instrument demised, and thereon to pursue the business of a common carrier at and for such tolls, rates, charges and revenue as the Railroad may from time to time impose, collect and receive; provided, however, the same shall be reasonable:

To have and to hold the above described premises and property, with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the Railroad for and during the period and term aforesaid; the Railroad yielding and paying therefor unto the Yards the rental hereinafter provided, and faithfully complying with all and singular the terms and conditions upon which the demise herein contained is made.

Article II. The Yards does hereby assign, transfer and set over unto the Railroad all its right, title and interest in and to all and singular the agreements, contracts, or undertakings now existing providing for or covering the matter of transportation of products or the switching or transferring of cars; also all leases, agreements or writings in and by which, or upon the terms of which, it holds any part or portion of its right of way or railroad tracks and appurtenances.

Article III. The grant in this instrument contained is upon the following express conditions:

(a) That the Railroad will, at its own sole cost and expense, keep and maintain the premises and property by [fol. 1210] this instrument demised in as good order and condition as the same are at the delivery of this instrument, and the same from time to time will renew, repair and replace and on the termination of this instrument, however the same may be terminated, will deliver said premises and property to the Yards in as good order and condition as when received, ordinary wear and tear excepted.

(b) That the Railroad will in due season, and as the same become due, pay all taxes and assessments levied, assessed or imposed by state, city or other municipal authority, or by the Government of the United States, upon the right of way, railroad, railroad tracks, and all and

singular the premises and property by this instrument demised, or upon the traffic or business conducted thereon, or upon the income derived from the operation thereof, and hold the Yards forever harmless against the same.

(c) That the Railroad will conduct, operate and manage, at its own sole cost and expense, the premises and property by this instrument demised in a proper and economical manner, and in such a way as to enable trains easily and conveniently to approach the stock and cattle yards and appurtenances of the Yards, and as will secure the prompt handling and dispatch of all business that may be offered upon said line of railroad and appurtenances, or consigned to or from said Yards and will at all times hold itself in readiness to meet the demands of business offering to, or passing upon, over and along the said demised tracks or contiguous thereto.

(d) That the Railroad will at the times and in the manner hereinafter mentioned, promptly pay the rental by this instrument reserved to be by the Railroad paid to the Yards.

(e) That the Railroad will, at all times, hold itself in readiness to do, and will do and perform, the duties pertaining to a railroad, or of a railroad character, imposed upon, or required by its charter or act of incorporation to be done and performed by the Yards.

[fol. 1211] Article IV. The rental to be paid by the Railroad for the premises and property by this instrument demised shall be two-thirds of the entire net earnings and revenue, as hereinafter specified, for the full term of the demise herein contained, derived by the Railroad from the operation of all its lines of railroad and railroad tracks, now owned or hereafter acquired, including the lines and railroad of said Chicago Company. Said rental shall be payable on demand of the Yards, from time to time made, and to that end the Railroad will, on demand of the Yards, submit for examination to the nominee of the Yards its books, papers, vouchers and documents showing in full and in detail its operations, and will on demand, from time to time, pay over to the Yards all such net earnings or revenue as it may have on hand after paying the cost of operation aforesaid, and deducting or paying the fixed charges upon the lines of railroad of the party of the second part due or accrued at the time of such demand.

Article V. The Railroad covenants and agrees to take the premises and property in this lease described, for the term and upon the conditions herein expressed, and the same to operate and conduct in the manner above in Article III, described, at its own sole cost and expense, and the rental herein reserved to pay or cause to be paid at the times and in the manner in Article IV mentioned and described; further, to operate and conduct said line of railroad in a proper, thorough and economical manner; to pay all taxes, assessments and impositions levied, assessed or imposed by state, city or other municipal authority, or by the Government of the United States, upon the premises and property in this instrument demised or upon its traffic, business or income; to accept assignment and transfer of the agreements, contracts and undertakings in Article II prescribed, and the same to complete, carry out and perform as in and by said agreements, contracts and undertakings the [fol. 1212] Yards has covenanted and agreed; to conduct, manage and operate the line of railroad of the Chicago company, if the same shall be acquired by it, in connection with and as an extension of its railroad, and the railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage and behoof of the business and affairs of the Yards; and that it will maintain the premises and property by this instrument demised, and the same renew, replace and repair, and, at the expiration of this instrument, the same will deliver and return to the Yards in as good order and condition as when received, ordinary wear and tear excepted.

Article VI. In arriving at the net earnings and revenue of the Railroad derived from the operation of its railroads and property, there shall be deducted from the gross earnings of the Railroad:

(1) The actual cost of materials, supplies, and labor in maintaining, renewing, replacing, repairing, extending and operating the railroads and property of the Railroad.

(2) The taxes and assessments paid by the Railroad.

(3) Fixed charges upon the lines of railroad and rolling stock of the party of the second part hereto, including interest payable or to become payable on the mortgage bonds of the Chicago Company.

(4) Actual cost of equipment, including moneys due on the locomotives of the Yards herein demised, or of the Chicago Company.

(5) Cost of extraordinary improvements or betterments upon the lines of the Railroad, required to be made by state or municipal authority.

(6) All other necessary expenses incurred in operating the lines of the railroad consistent with the efficient operation of the same, it being the intention hereof that the Yards [fol. 1213] shall receive as rental hereunder the actual two-thirds of the entire net earnings and revenue of the Railroad to the same extent as if the Yards was the owner of the railway lines of the Railroad, and all extensions thereof.

In determining the cost of maintenance and operation of the line of railroad of the party of the second part hereto, and of the amount of the fixed charges thereon, all facts and information relative thereto, in addition to what is shown by the books of account and vouchers above provided for, shall always on demand be furnished and supplied freely and fully to the Yards. To that end the Railroad covenants and agrees that it will, during the term herein, demised, keep accurate and true accounts of all its receipts and expenditures and upon whatever account the same were received or disbursed by it, all of which shall always be subject to inspection by the Yards, or its nominee.

Article VII. The Railroad covenants and agrees that if it shall at any time hereafter during the existence of this lease or demise fail or omit to pay the rent herein reserved, or any part of said rent when the same should be paid as herein provided, or shall fail or omit to keep and perform all the covenants and agreements herein contained by it to be kept and performed, or any of them, and shall continue in such default for the period of ninety days, then and in either and every such case, it shall be lawful for the Yards at its option to enter into and upon the premises and appurtenances, demised and every part thereof as to which such default exists and remove all persons therefrom without let or hindrance by the Railroad; thenceforth the said demised premises and property and all additions and improvements which shall have been made to the same to have, hold, possess and enjoy as in the first and former

estate of the Yards in the said premises and property, with the right to collect the rentals then due; or may take such [fol. 1214] other and further action for the enforcement of the provisions of this agreement as to the said Yards may seem advisable, and the Railroad to expel and put out, using such force as may be necessary; but all remedies, whether at law or in equity, or by this instrument reserved, to be always construed as being cumulative, and no one remedy as a bar upon, or to the exercise of, any other remedy.

Article VIII. The Railroad will pay and discharge all claims, demands, rights, suit or suits, the liability for which shall accrue or become fixed and determined from and after the date of this instrument, and forever hold the Yards harmless from and against the same; and the Yards will pay, discharge and assume all claims, demands, rights, suit or suits, the liability for which shall accrue or become fixed and determined prior to the date of this instrument, and forever hold the Railroad harmless from and against the same. This covenant, on behalf of the Railroad, shall extend to, and comprehend, any claim or demand, judgment or decree, loss or expense, incurred by the Yards because of any law or statute of the State of Illinois making liable the lessor or owner of the track on which the liability may accrue.

Article IX. The Railroad will from time to time release to the Yards any of the property or premises by this instrument demised not necessary to the Railroad in the operation of the premises and property by this instrument to it demised.

Article X. This agreement shall inure to the benefit of and be binding upon the successors, assigns, purchasers, sublessees and licensees of the parties hereto, and the provisions herein shall always and irrevocably be held to be covenants running with the land and to bind all persons, firms and corporations taking the premises herein described, or any part thereof, by, through or under the parties hereto, or either of them.

[fols. 1215-1256] In witness whereof, the parties hereto have caused these presents to be executed by their respective Presidents and their corporate seals to be hereunto attached, attested by their respective Secretaries, the action of said

Presidents severally being thereto duly authorized by the several Boards of Directors of the parties hereto the day and year first above written.

The Union Stock Yard and Transit Company of Chicago, by N. Thayer, President.

Union Stock Yard & Transit Co., of Chicago.

Attest: J. C. Denison, Secretary.

Chicago and Indiana State Line Railway Company, by J. A. Spoor, President.

Chicago & Indiana State Seal Line Railway Co.

Attest: James Miles, Secretary.

EXHIBIT No. 4

[fol. 1257] This supplemental indenture, made this 21st day of January, 1929, by and between The Chicago Junction Railway Company, a consolidated corporation organized and existing under the laws of the State of Illinois, hereinafter called the Junction Company, as first party, The Union Stock Yard and Transit Company of Chicago, a corporation organized and existing under the laws of the State of Illinois, hereinafter called the Yard Company, as second party, The Chicago River and Indiana Railroad Company, a corporation organized and existing under the laws of the State of Illinois, hereinafter called the River Company, as third party, and The New York Central Railroad Company, a consolidated corporation organized and existing under the laws, among other states, of the State of Illinois, hereinafter called the Central Company, as fourth party, witnesseth:

Whereas, on the nineteenth day of May, 1922 the said parties, pursuant to authority of the Interstate Commerce Commission granted in its certain report and order made on the sixteenth day of May, 1922 in its proceeding listed as Finance Docket No. 1165, entered into a certain indenture of lease whereby the Junction Company demised and leased unto the River Company, its successors and assigns, for a term of ninety-nine (99) years from and after

the date thereof, and thereafter at the election (to be exercised as therein provided) of the River Company or of its successors and assigns in perpetuity, all and singular [fol. 1258] the certain premises and properties, rights and interests in said indenture of lease described; and

Whereas, the Interstate Commerce Commission on the third day of December, 1928 made a supplemental report and order in its said proceeding (Finance Docket No. 1165), which said report holds that the terms and provisions of Article XII of said indenture of lease are not in conformity with the said order of the Commission of May 16th, 1922 and directs that said lease should therefore be reformed to the extent necessary to bring it into conformity with the Commission's said authorization.

Now, therefore, it is agreed by and between the parties hereto as follows:

1. Said indenture of lease shall be, and the same hereby is amended as follows:

(a) By the elimination therefrom of the following recital, to-wit:

"Whereas, it is also mutually desired that the Central Company shall be granted an option, to continue during the term of said lease, to purchase either in its own name or in that of its nominee all of said properties so proposed to be leased as above recited; and"

(b) By eliminating the words "and option" from the following recital, to-wit:

"Whereas, it will be in the public interest, and the present or future public convenience and necessity require or will require, and it will be to the mutual benefit of the [fol. 1259] parties hereto, that the lease and option herein provided for shall be made upon the terms and provisions herein contained; and"

(c) By eliminating Section 2 of Article IV, entitled "Warranties and liens", and by substituting in lieu thereof the following:

Section 2: The Junction Company and the Yard Company each covenants and agrees that during the term hereof it will not, except with the sanction and consent in writing of the River Company, create or place upon the premises

and properties hereby demised and leased or any portion thereof any lien, encumberance or other obligation, and will take no corporate action, either directly or indirectly, sanctioning the creation of any such lien, encumberance or other obligation.

(d) By eliminating from Article X, entitled "Covenant to maintain properties and equipment and return same at end of lease", the following language, to-wit:

"except in the instance of expiration resulting from or arising by the exercise of the option of purchase provided for in Article XII hereof."

(e) By eliminating therefrom Article XII, entitled "Grant to the Central Company of an option to purchase demised properties" and all the terms and provisions thereof.

(f) By eliminating the words "and purchase" from Article XIV entitled "Yard Company Joining" and reading as follows:

"The Yard Company hereby consents to and ratifies the foregoing lease, including the option of extension and purchase therein contained."

[fol. 1260.] (g) By eliminating from Article XVIII, entitled "Inventory of Personal Property", the following language, to-wit:

"except in the instance of expiration resulting from or arising after the exercise of the option of purchase provided for in Article XII hereof."

The purpose of the amendments herein made to said indenture of lease is to eliminate therefrom and to terminate the option to purchase the demised properties granted to the Central Company under the provisions of Article XII thereof, and it is hereby agreed that said option shall be terminated as of the date hereof.

All of the covenants, terms and provisions of said lease as hereby amended shall continue in full force and effect.

2. The parties hereto herewith confirm all the covenants, terms and conditions of said indenture of lease as amended by the provisions of this supplemental indenture and herewith agree to be bound by and to perform the same.

In witness whereof, the parties hereto have caused these presents to be executed in quadruplicate by their respective presidents or vice presidents and their corporate seals to be hereunto affixed and attested by their respective secretaries, such action of said officers severally being duly authorized by the respective boards of directors of the parties hereto, all as of the day and year first above written.

The Chicago Junction Railway Company, By A. G. Leonard, President.
(Corporate Seal)
Attest: J. W. Austin, Secretary.

[fols. 1261-1262] The Union Stock Yard and Transit Company of Chicago, By A. G. Leonard, President.
(Corporate Seal).
Attest: J. W. Austin, Secretary.

The Chicago River and Indiana Railroad Company, By P. E. Crowley, President.
(Corporate Seal).
C. J. B., R. J. C.
Attest: J. M. O'Mahoney, Assistant Secretary.

The New York Central Railroad Company, By P. E. Crowley, President.
(Corporate Seal).
C. J. B., R. J. C.
Attest: J. M. O'Mahoney, Assistant Secretary.

(Here follow 4 photolithographs, side folios 1263-1266)

EXHIBIT 6

1635

U. S. Y. & T. Co. No. 10.

(Cancels and supersedes all previous Schedules and Amendments)

The Union Stock Yard & Transit Company

OF CHICAGO

Interstate Commerce Commission
Docket No. 34296 (date 2-11-1937
Complainant's
Protestant's
Intervener's
Defendant's
Respondent's
Applicant's
Commission's
Exhibit No. 6
Witness Henkle
Reporter Johnston

SCHEDULE OF CHARGES

The effective date of this tariff was postponed to November 2, 1936 by order of the Secretary of Agriculture in Docket 472 and was later voluntarily postponed by the Union Stock Yard and Transit Company of Chicago to January 1, 1937.

ISSUED AUGUST 24, 1936 EFFECTIVE SEPTEMBER 3, 1936

SECTION 1

YARDAGE CHARGES:

The following yardage charges will be made on all live stock received at these yards:

(A)	Cattle	40c per head
(A-W-R)	Calves (400 lbs. or under)	30c per head
(A)	Hogs	14c per head
(A-W)	Sheep and/or Goats	9c per head
(A)	Horses and Mules	40c per head

Yardage charges named above do not include yarding from scales, after sale, on outbound shipments by rail.

A service and weighing charge will be made and collected on all live stock weighed over our scales the second and successive times as follows:

(A)	Cattle	20c per head
(A)	Calves (400 lbs. or under)	15c per head
(A)	Hogs	7c per head
(A-W)	Sheep and/or Goats	4½c per head

(A-W) The following charges will be made, in addition to the regular yardage charge, on live stock delivered at or shipped from these yards in other than railroad cars: (On outbound shipments the charge will not be assessed in shipments destined to points within the corporate limits of the City of Chicago.)

(A-N)	Horses and/or Mules	25c per head
	Cattle	15c per head
	Calves (400 lbs. or under)	7c per head
	Hogs	7c per head
(W)	Sheep and/or Goats	7c per head

SECTION 2

FEED AND FEEDING CHARGES:

Feed used in these yards will be charged for at the following prices:

Corn	$1.75 per bushel measure
Tame Hay	1.80 per cwt.
Prairie Hay	1.80 per cwt.
Oats	1.10 per bushel measure
Alfalfa	1.80 per cwt.

Horses and Mules:—Horses and Mules arriving after 6:00 p. m., 50 cents for that day, and $1.00 per day for each day thereafter.

—Horses and Mules arriving before 6:00 p. m., $1.25 for the first day, and $1.00 per day for each day thereafter.

—Horses and Mules stopping enroute for feed, water and rest in barns, $1.00 per head, per day or fraction thereof.

—Mules stopping en route for feed, water and rest in pens, 65c per head per day or fraction thereof.

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Corn	$1.75 per bushel measure
Tame Hay	1.80 per cwt.
Prairie Hay	1.80 per cwt.
Oats	1.10 per bushel measure
Alfalfa	1.80 per cwt.

Horses and Mules:—Horses and Mules arriving after 6:00 p. m., 50 cents for that day, and $1.00 per day for each day thereafter.

—Horses and Mules arriving before 6:00 p. m., $1.25 for the first day, and $1.00 per day for each day thereafter.

—Horses and Mules stopping enroute for feed, water and rest in barns, $1.00 per head, per day or fraction thereof.

—Mules stopping en route for feed, water and rest in pens, 65c per head per day or fraction thereof.

SECTION 3

BEDDING:

Straw	$1.20 per cwt. (in pens)
Straw	1.35 per cwt. (in cars)
(A-W) Sand Bedding, not exceeding ¼ inch in depth	2.00 per deck

SECTION 4

DIPPING AND SPRAYING:

All dipping and spraying is subject to the supervision and regulation of the Bureau of Animal Industry, U. S. Department of Agriculture.

The Stock Yards Company is not responsible for loss of or damage to live stock occasioned by or resulting from dipping or spraying.

The necessary dipping and spraying material and use of the facilities at the dip and spray and the labor are included in the charges for dipping and spraying, which are as follows:

(A-W) Dipping Sheep and/or Goats	10c per head, minimum, $5.00 *
(A) Spraying Hogs	10c per head, minimum $5.00 *

*The Minimum charge for dipping or spraying will not apply when one or more owners dip or spray 50 head or more from one charging (N).

Spraying Wagons	75c each
Spraying Motor Trucks	$1.00 each

SECTION 5

IMMUNIZING HOGS:

The Stock Yards Company furnishes facilities, the veterinary service, and the necessary labor required in immunizing hogs, all of which is subject to the supervision and regulation of the Bureau of Animal Industry, U. S. Department of Agriculture.

(W) Only serum and virus manufactured under Government supervision is used. The Stock Yards Company is not responsible for loss of or damage to hogs occasioned by or resulting from vaccination, and does not guarantee immunity to the hogs vaccinated.

Charges are as follows:

Serum .....1½c per cubic centimeter for the serum used
Virus .....1½c per cubic centimeter for the virus used

The above charges include the use of the facilities, veterinary service, and the necessary labor of taking temperatures and vaccinating the hogs.

SECTION 6

CATTLE TESTING:

Cattle are tested for tuberculosis and other diseases by the U. S. Bureau of Animal Industry or by veterinarians under the direction of the State Veterinarian of the State of Illinois.

(W) This company is not responsible for loss of or damage to stock moving to and from the testing facilities, or in process of testing, or as a result of the test, or for the efficacy of the test.

For the use of equipment, when services and tags are provided by the regulatory body making the test, no charge.

When tags are furnished, and affixed, by employees of this Company, the charge is 10 cents per head.

If special equipment in barns is desired, the use of such facilities and all services in connection therewith will be charged for under special agreement.

SECTION 7

CLEANING AND DISINFECTING:

(W) When it is necessary to clean and disinfect any portion of these yards by reason of movement in, or through, the yards of live stock exposed to or infected with a contagious disease, the owner of such exposed or infected live stock will be required to pay for such disinfecting as follows:

Chutes	$2.50 each
Pens (single)	2.50 each
Pens (double)	4.00 each
Alleys	.40 per hundred square feet

(N) For disinfecting cleaned cars, trucks, trailers or other vehicles, actual cost of labor and material used plus twenty (20) per cent for supervision.

For use of facilities and water for washing trucks, the following charges will apply: —

Trucks under 2-ton capacity	25c
Trucks 2-ton capacity or over	50c

SECTION 7

CLEANING AND DISINFECTING:

(W) When it is necessary to clean and disinfect any portion of these yards by reason of movement in, or through, the yards of live stock exposed to or infected with a contagious disease, the owner of such exposed or infected live stock will be required to pay for such disinfecting as follows:

Chutes	$2.50 each
Pens (single)	2.50 each
Pens (double)	4.00 each
Alleys	.40 per hundred square feet

(N) For disinfecting cleaned cars, trucks, trailers or other vehicles, actual cost of labor and material used plus twenty (20) per cent for supervision.

For use of facilities and water for washing trucks, the following charges will apply: —

Trucks under 2-ton capacity	25c
Trucks 2-ton capacity or over	50c

SECTION 8

BRANDING:

Various state laws require that all animals shipped into the state for feeding purposes must be branded.

This company is not responsible for loss of or damage to stock moving to or from the branding station, or in process of branding, or as a result of branding.

(A-W) For the use of facilities and labor a charge of 25c per head per iron will be made.

SECTION 9

SPECIAL SALES:

This company maintains special stables and pavilions for sales of pure bred live stock.

(W) The use of such facilities and all services in connection therewith will be charged for under special agreement made in advance of their use.

SECTION 10

SPECIAL SERVICES:

(W) Special services not ordinarily or usually required in the handling of live stock will be charged for under special agreement made in advance.

SECTION 11

Any firm, corporation, or individual by themselves or their employees, detected using unfair, dishonest or fraudulent practices will be denied the privileges of these Stock Yards, treated as a trespasser and dealt with accordingly.

SECTION 12

OUTBOUND SHIPMENTS

A charge of $3.00 per car, exclusive of the loading charge, will be made on all outbound movements for services rendered beyond the scale facilities. The charge will be made against the carrier receiving the outbound haul on such shipments.

INBOUND SHIPMENTS

A charge of $3.00 per car, exclusive of the unloading charge will be assessed against and collected from each railroad delivering a car of live stock at the unloading platforms of this Company, as compensation to this Company for the service of counting the animals, notifying consignee of arrival, furnishing a list of dead and crippled animals to the railroads, furnishing weights on directs, collecting and remitting freight charges on such live stock and furnishing with respect thereto, as the railroad's agent, such services and facilities as the railroad is required to furnish in making delivery of such live stock to consignee thereof.

SECTION 13

LOADING ACCESSORIAL SERVICES (N)

The service of loading carloads of live stock when performed by this Company does not include the cost of partitioning cars, or the tying of bulls. Where these accessorial services are required, arrangements must be made by the owner or his agent sufficiently in advance of the loading time so that arrangements may be made therefor at charges to be agreed upon.

SECTION 14

REMOVING PARTITIONS OR TEMPORARY DECKS (A-N)

When it is necessary to remove partitions or temporary decks in unloading cars containing live stock, the following charges will be assessed:

REMOVING PARTITIONS, 50 cents each, subject to a minimum of $1.00 per car.
REMOVING TEMPORARY DECKS, $2.50 per car.

SECTION 15

CERTIFICATES OF LOADING OR UNLOADING (A-N)

Upon request of the owner, his agent, or the carrier handling the shipment this company will furnish loading or unloading certificates. A charge of twenty-five (25) cents per each certificate will be made. When it is necessary to have a notarial seal affixed, the notarial fee will be collected in addition to the 25 cent charge.

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Upon request of the owner, his agent, or the carrier handling the shipment this company will furnish loading or unloading certificates. A charge of twenty-five (25) cents per each certificate will be made. When it is necessary to have a notarial seal affixed, the notarial fee will be collected in addition to the 25 cent charge.

SECTION 16

SPRINKLING OR DRENCHING STOCK CARS (A-N)

A charge of twenty-five (25) cents per deck will be made for sprinkling or drenching stock cars, the charge to apply each time the service is performed before, during or after loading. This company will not be liable for injury to or death of animals drenched or sprinkled.

SECTION 17

SPRINKLING HOGS IN THE SHIPPING DIVISION (A-N)

A charge of twenty-five (25) cents per pen will be made for sprinkling animals held in the shipping division awaiting loading. This company will not be liable for injury to or death of hogs as the result of sprinkling.

sion. Before the Commission the Yard Company denied jurisdiction both in its pleadings and in the evidence. The report of the Commission makes no findings as to the change of facts and denied rehearing without assignment of reasons. This lack of findings as to facts upon which the jurisdiction of the Commission depends should invalidate the order. It puts upon this Court the burden of ascertaining the facts from the lengthy record. They are in substance as follows (R. 148 et seq.).

Neither the Yard Company nor any holding Company now operates any railroad or "hauls" or "engages in the [fol. 1288] transportation" of any property by railroad. Neither it nor any holding company has any interest, direct or indirect, in any other company which operates a railroad or hauls or transports property to and from the Yard. While owning extensive railroad trackage and some equipment outside the Yards such properties were leased ten years ago to a subsidiary of the New York Central Railway with which the Yard Company is wholly dissociated. Since then the railway properties have been operated by the New York Central subsidiary and it, in turn, accords to other trunk line railroads the privilege of running their trains over the trackage to and from the Yards. The New York Central pays a fixed annual rental for its use of the railway properties. The Yard Company is now solely a "public stockyards" as defined in the "Packers and Stockyard Act" and is subject as such to the jurisdiction of the United States Secretary of Agriculture.

Adequate consideration of this important change of activity requires comparison of the particulars of the situation today and as they existed some years ago.

Before undertaking a comparison and analysis of this Court's previous decision in U. S. v. Union Stock Yards, 226 U. S. 286, attention is called to what is submitted to be an erroneous view of the court below that it is "not necessary" to decide this question of common carrier status.

(a) Necessity for Decision as to Whether the Yard Company is a "Common Carrier by Railroad."

The whole of the Commission's jurisdiction to make orders of any kind against any party before it is derived from Section 1 (1) of the Act. The part thereof which is material here is the following:

[fol. 1289] "Sec. 1(1) That the provisions of this Act shall apply to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad * * *."

Thereafter, throughout all the provisions of the statute, each command and prohibition is directed to "common carriers subject to the provisions of this Act."

It must follow that whether or not the Yard Company is subject to the jurisdiction of the Interstate Commerce Commission depends solely upon the question whether it is a "common carrier engaged in the transportation of property wholly by railroad." The court below declared that it was "not essential" to make a decision as to such matter. Seemingly the view of the court below was that whether the Yard Company be a common carrier by railroad or not:

"The Commission found that the Yard Company was the livestock terminal for all complaining carriers. The Yards Company provided for the carriers the means of making deliveries of livestock to the consignees at this public yards. But the delivery was a part of the transportation and of the duty of the carrier. Covington Stock Yards v. Keith, 139 U. S. 128; Adams v. Mills, 286 U. S. 397."

Evidently it was the thought of the court below that a concern may be subject to the jurisdiction of the Commission even though it be not a "common carrier by railroad" within the provisions of the Act if it "supplies" to railroads the "means" by which the railroads discharge railroad "transportation" duties to the public.

No matter what a concern may do it is not subject to the jurisdiction of the Commission if the things which it does [fol. 1290] do not constitute "common carriage by railroad" within the provisions of the Act. The things which it does may have a bearing upon the determination of its status and they need to be examined from that standpoint. However, there is no escape from the duty of deciding whether or not the things which it does constitute it a "common carrier of property by railroad." Therefore the court below erred in assuming that the jurisdiction of the Commission attaches to any sort of concern or its activities not coming within that category.

(b) The situation when U. S. v. Union Stock Yards, 226 U. S. 286, was decided.

When the Union Stock Yards was first established it was authorized so to do and did in fact construct many miles of railroad trackage from its properties and leading out to points of connection with trunk line railroads. Years afterwards the Yard Company leased all such railway facilities to the "Chicago Junction Railway." Both that railway company and the Yard Company were almost completely owned by a single holding company and such was the situation before this Court in 226 U. S. 286.

At that time the Chicago Junction Railway was a full-fledged operating common carrier of property by railroad. With its own locomotives and crews it was then engaged in "hauling" various kinds of property into and out of the stockyards district under joint through interstate freight rates. It physically transported such property for long distances between points of connection with trunk line railroads and shippers and consignees within and outside the yard area using its own locomotives, crews, and other railway facilities. Contemporaneously the Chicago Junction [fol. 1291] Railway extended to the trunk line railroads the privilege of operating their own trains over the rails of the Chicago Junction for the purpose of receiving and delivering livestock at the stockyards. That was in the nature of a "trackage" agreement. Upon arrival of the loaded livestock cars at convenient places at the edge of the Yards the Yard Company emptied the contents into unloading pens nearby which the cars had come to rest. Additionally the Yard Company collected for account of the railroads their freight transportation charges and performed other clerical services incident thereto.

In the light of those facts this Court was required to consider whether or not both the Union Stock Yards and the Chicago Junction Railway constituted "common carriers by railroad" within the Interstate Commerce Act. As to the Chicago Junction the affirmative holding did not require or receive much discussion. But the Yard Company was likewise held to be such a "common carrier by railroad."

The reasoning of this Court reveals the basis for such decision. The separate corporate identities of the Yard Company and the Chicago Junction Railway were treated as non-existant because of the complete control of both by a single holding company.

Considering the two concerns as but one the court concluded that such single concern was engaged in the physical haulage and delivery of property both at and outside the yards in continuous through movements in interstate commerce over its own rails, with its own equipment, and under joint through rates with connecting trunk line railroads. The Yard then shared the earnings of the railway on a percentage basis. Continuing to view the two concerns as if one the court noted the trackage arrangement with [fol. 1292] trunk line railroads by which the trains of the latter came to and from the Yard properties under the "trackage" plan which carried with it unloading of the cars by the Yard Company for account of the trunk lines. The controlling, outstanding fact which then existed was the actual haulage of freight property by the Chicago Junction Railway in its own name and behalf and its trackage arrangement with trunk line railroads referred to. As the Chicago Junction Railway was in every respect a full-fledged operating railroad common carrier and as it and the Yard Company constituted in law a single concern both physically transporting and making receipt and delivery of property the holding of this Court and the reasons for it are clear.

There was no holding that the Yard Company was or could be a common carrier by railroad standing alone and independently of its operation of the railroad properties through the Chicago Junction as a transporting carrier. The mere ownership of the railway facilities and the performance of unloading of livestock and certain clerical services in behalf of the trunk line railroads did not cause this Court to declare the Yard Company then to be a common carrier by railroad. The decision in that case has never since been cited by any court in support of the view that a public stockyards is made subject to the Interstate Commerce Act when it does not transport property but merely makes certain of its unloading facilities available to trunk line railroads in order that the latter may serve the Yards.

(c) Subsequent change of situation.

Years after the decision mentioned there occurred a fundamental change in the situation just described. With [fol. 1293] the sanction of the Commission (In Re Chicago

Junction Railroad, 71 I. C. C. 631; 264 U. S. 258; 150 I. C. C. 32) a wholly owned subsidiary of the New York Central Railway leased all the properties of the Chicago Junction and the exclusive privilege of operating such railroad for a long term of years upon the basis of a fixed annual rental. The New York Central thereupon extended to other trunk line railroads trackage rights to and from the Yards. From that time onward the Chicago Junction Railway ceased to be "engaged in the transportation of property by railroad." While retaining its corporate existence it divested itself of all the functions of an operating common carrier entitled as such to deal with shippers and other carriers. It ceased to "haul" or otherwise "transport" property of any kind for any distance. It became as a consequence the mere possessor of a lease of the railway properties from the Union Stock Yard which lease it had, in legal purpose and effect, assigned over to the New York Central Railway. In substance the Union Stock Yard had directly leased the railway properties and the privilege of their operation to the New York Central for a long term of years.

As neither the Chicago Junction nor the Union Stock Yard in fact now operates any railroad or hauls or transports any property whatsoever there is no foundation for the proposition that the Union Stock Yards is a "common carrier engaged in the transportation of property wholly by railroad." To be subject to the jurisdiction of the Commission nothing else may suffice. The essential condition precedent to the Commission's jurisdiction is that a concern must actually be a "common carrier" which by its own meaning connotes some sort of institution which "carries" for the public from one place to another. Mere [fol. 1294] charter power to be such a "common carrier" alone does not govern. Paragraph 1(a) of Section 1 continues on to provide that for a common carrier to be subject to the Act it must also be "engaged in the transportation of property." By those words Congress limited the scope of the Act in its application to particular concerns. The intent was to reach only those common carriers which are actually functioning as such in relations to the shipping public as transporters and haulers of goods. It was further made requisite that such concerns be those which "transport" property "wholly by railroad" or, under certain circumstances, partly by railroad and partly by water.

In declaring what constitutes a "common carrier by railroad" this court in Wells Fargo & Co. v. Taylor, 264 U. S. 175, said:

It is * * * one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier."

The holding in such case was affirmed in U. S. ex rel. v. C. N. Y. & B. R. Co., 265 U. S. 292, and it was there stated that the definition in the Taylor case

"—was not made to rest upon any peculiarity in the Act in review, but was said to be in accord with the ordinary acceptation of the words * * *."

In U. S. v. American Railway Express Co., 265 U. S. 425, this Court further said:

"The natural meaning of the term 'carrier by railroad' is one who operates a railroad * * *."

[fols. 1295-1317] The scheme of the Act is plain in its intended application. It is designed to reach only those railroads which are "engaged in transporting" property in interstate commerce, and only those railroads operating as such and transporting property in interstate commerce as "common carriers."

The limitations in Section 1(1) of the original Act of 1887 (still in force) were so apparent that in order to reach certain other kinds of companies Congress in Paragraph 3 of Section 1 afterwards defined the term "common carrier" so that it would include by name pipe line companies, telegraph, telephone, and cable companies, express companies and sleeping car companies and "all persons natural or artificial engaged in such transportation or transmission as aforesaid as common carriers for hire" (Sec. 1, par. 3).

In further recognition of its intended restriction upon the general scope of the Act, Congress, in express terms, made a significant exception in Paragraph 1 of Section 20 dealing with annual reports. In the first sentence thereof it required such annual reports from all common carriers subject to the provisions of the Act and then added "and from the owners of all railroads engaged in interstate commerce as defined in this Act." Thereby, in respect to the particular matter of annual reports, Congress required that the

"owners" of all railroads subject to the Act should make annual reports as well as "common carriers subject to the provisions of this Act."

[fols. 1318-1323] EXHIBIT No. 18

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity 78-351

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, et al., Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

Brief in Behalf of the Union Stock Yard and Transit Company of Chicago, Intervenors

Charles E. Cotterill, 70 East 45th Street, New York, N. Y., Luther M. Walter, Chicago, Ill., Solicitors for Intervenors.

Mark W. Potter, New York, N. Y., Counsel.

[fols. 1324-1360] (b) Position of Union Stock Yard Company.

On its part the Stock Yard Company respectfully takes these counter positions:

1. At one time the Yard Company was a common carrier by railroad because of facts which then existed. It is not any longer a "common carrier engaged in the transportation of property by railroad" in view of fundamental changes in its activities and relationships which occurred at a comparatively recent date and which no judicial tribunal heretofore has ever considered.

2. Not being a "common carrier engaged in the transportation of property by railroad" the Stock Yard Company may not be made responsive to any order of the Commission. "Terminal Companies" which are not "com-

mon carriers by railroad" are not subject to civil orders of the Commission even though they may under contract function as "agents" in assisting railroads to perform certain of their transportation obligations.

[fols. 1361-1370] EXHIBIT No. 25

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 24375

HYGRADE FOOD PRODUCTS CORPORATION, Complainant,

against

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Defendants.

Petition for Resettlement of Order and for Rehearing.

[fol. 1371] IX

The duties, obligations and responsibilities of the petitioner are not in this case to be measured by those of a common carrier. It is not answerable in this case as for a violation of any such duty.

The petitioner is not now a common carrier. During the period which this case involves it did not participate as a railroad common carrier in the performance of any obligation under Section 15, Par. 5. Suggestion that petitioner was a participating common carrier would rest on the decisions of the Supreme Court in U. S. v. Union Stock Yards, 226 U. S. 286, and Adams v. Mills, 284 U. S.

In view of changed conditions neither of those decisions is authority for now regarding the petitioner as a common carrier or as functioning as such. This case relates to activities of the Stock Yards beyond and subsequent to unloading into pens and neither of such cases ever was an authority and is not now an authority holding that such after-services are those of a common carrier.

[fol. 1372] In those cases the Supreme Court was not classifying the petitioner in any permanent way. In the case of Adams v. Mills the court actually avoided decision whether or not the change of circumstances had caused the Stock Yards Company to cease to be a common carrier by railroad. The importance attached to facts in those cases indi-

cates that in the absence of those facts and on the particular facts in the present case the court would not now regard petitioner as a common carrier.

When U. S. v. Union Stock Yards was decided not only did the Stock Yards Company own all the railway facilities involved which it had leased to the Chicago Junction Railway under a profit sharing arrangement, but in addition both companies were controlled to the extent of more than 90% by a single holding company. While it was in the name of the Chicago Junction Railway that the railroad properties then were being operated those important facts are the ones which caused the court to conclude that the whole function of transporting and delivering the livestock into pens was "joint" and actually under a single control. Such functioning of the Stock Yards jointly with the Chicago Junction Railway in the performance of services coming within the scope of "transportation" was made the controlling consideration as to its common carrier status.

But now all that has changed. No longer is the Chicago Junction Railway an operating railroad company. It has since leased to the New York Central all the properties which in turn it leased from The Union Stock Yard & Transit Company. Therefore neither the Stock Yard Company [fol. 1373] nor the Chicago Junction operates any railroad and they possess nothing more than legal title to certain railroad properties which now belong to and are being operated by the New York Central through one or more subsidiaries of its own. Insofar as concerns the function of unloading the livestock into pens the Stock Yard Company acts solely as agent for the trunk line railroads. For services and facilities after removal of the stock from the unloading pens it acts solely in its own capacity of a stock yards company.

The true situation then is that during the period involved in this case the Stock Yard Company has not operated and does not operate any "railroad"; it is not performing any service "jointly" with the Chicago Junction Railway; nor is the latter operating any railroad. Indeed in the decision of the Commission in the present case there is no statement that the Commission now views The Union Stock Yard & Transit Company as a common carrier by railroad.

If not otherwise a common carrier by railroad the Stock Yard Company is not made such because it may be performing some services as agent of and for account of the

railroads and others in its own behalf. Merely because the word "transportation" is defined in Paragraph 3 of Section 1 in such way as to embrace in part some of the things which the Stock Yard Company does in behalf of the railroads has nothing to do with the question whether petitioner is a common carrier by railroad. Speaking of the things included within the definition of "transportation" the Supreme Court has said:

[fol. 1374] "But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

(Ellis v. I. C. C., 237 U. S. 434.)

That is to say, railroad companies, in discharge of their common carrier duties, may engage others to assist them, as they employ station agents, engineers, etc. The fact that such others, in fulfilling their contract obligations may be doing things which, if done by a railroad company, would constitute "transportation by railroad," does not make the contractor a railroad common carrier if otherwise it is not. As held in the case of Brooklyn Eastern District Terminal v. U. S., 249 U. S. 296, affirming B. & O. v. U. S., 231 U. S. 274, a concern may be an agency of a railroad common carrier without being a railroad common carrier itself. It depends on the independent facts as to its own operations whether or not it is a railroad common carrier by railroad.

In the nature of things this position is bound to be correct. Paragraph 13 of Section 15 contemplates that at times shippers may, in behalf of railroad companies, do various things which it is the railroad's duty to do. It has yet to be suggested that in those instances shippers are converted into railroad common carriers by reason of the fact that what they happen to do for account of railroads may come within the definition of "transportation."

[fols. 1375-1424] Nothing in this discussion is to be confused with the situation involved in the Galveston Terminal Case, 219 U. S. 498, in which not only did the terminal company itself operate a railroad, but it was a mere subsidiary of railroads and was utilized by them to discharge their own admitted railroad common carrier duties.

If it be said that The Union Stock Yard & Transit Company still has on file with this Commission its Tariff I. C. C. 8 covering the service of unloading the livestock into pens as agent for the trunk line railroads such circumstance may not be taken as in any degree an admission of common carrier status because the tariff expressly provides it acts as agent and is still there over the protest of petitioner solely because of a prior refusal of this Commission to permit it to be withdrawn. (In Re Unloading, 52 I. C. C. 209.)

[fol. 1425] EXHIBIT No. 16

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 4109

Livestock Loaded and Unloaded at Chicago

Petition of the Union Stock Yard and Transit Company of Chicago for Rehearing, Reconsideration and Reargument and for Postponement of Effective Date of Order.

Now comes your petitioner, The Union Stock Yard and Transit Company of Chicago, respondent in the above entitled case, and respectfully asks the commission to grant a rehearing, reconsideration and reargument therein and to postpone the effective date of the order of December 11, 1935. In support of this petition your petitioner respectfully represents:

I

The order entered by the commission on December 11, 1935 cannot stand unless petitioner is in fact a common carrier by railroad. Admittedly it operates no railroad and transports no freight. It does nothing that could be claimed [fol. 1426] to be transportation except to perform the labor of loading and unloading animals, and uses no facilities that might be called a railroad except platforms, chutes and pens. It strains the imagination to conceive of driving animals as being transportation by railroad or to conceive of stock pens and other similar facilities as being a railroad; yet the commission reaches such a conclusion. This necessitates a careful examination of the process of reasoning by which the commission reached a result prima facie so illogical.

II

Apparently the commission relied principally on the decision of the supreme court in the case of United States v. Union Stock Yard, 226 U. S. 286, decided in 1912. The case was instituted at the request of the Interstate commerce commission primarily to determine whether the payment of a bonus by either the Stock Yard Company or the Chicago Junction Railway Company (the Junction) or the holding company (the New Jersey company), the owner of the shares of stock of both companies, could pay a bonus to a shipper along the lines of the Junction for the purpose of assisting the shipper in establishing a packing plant at the stockyards on the line of the Junction. It was brought to determine whether such a payment by any one of the three companies would or would not be the payment of a rebate prohibited by the Elkins act.

The court held that under the facts and circumstances then obtaining petitioner had not exempted itself from [fol. 1427] the operation of the Interstate commerce act by leasing its railroad properties to the Chicago Junction Railway Company for a term of years, and said among other things that your petitioner was a common carrier. It should be remembered that the language of the supreme court upon which the commission relies was used in connection with the determination by the court of the primary question that the payment of such a bonus was in the nature of a rebate prohibited by the Elkins act. That act was highly remedial in character and the court was willing to go to great lengths to enforce it.

At that time the Junction was operating a railroad and rendering services which no one at the present time would contend were not within the purview of the Interstate commerce act. Practically all of the stock of the Junction and ninety per cent of petitioner's stock were owned by the same holding company, and petitioner received two-thirds of the profits of the Junction. In its decision the court looked behind the corporate entities of petitioner and the Junction, considered them as one company, and reached its conclusion from a consideration of their collective activities.

The decision of the court shows clearly that what we have just stated is correct. It said (pp. 304-5):

"*Together*, these companies [*i. e.* the Junction and Stock Yard Company], as to freight which is being carried in

interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when *they* take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon [fol. 1428] its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. *They* are common carriers because *they* are made such by the terms of their charters, hold *themselves* out as such and constantly act in that capacity, and because *they* are so treated by the great railroad systems which use *them.*" (Italics ours.)

Again, speaking of the two companies collectively, the court said (p. 306):

"We think that these companies, because of the character of the service rendered by *them, their* joint operation and division of profits and *their* common ownership by a holding company, are to be deemed *a* railroad within the terms of the act of Congress to regulate commerce, and the services which *they* perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control." (Italics ours.)

[fol. 1429] At the risk of repetition: Nobody can read the decision without being impressed with the fact that the controlling factor was that the court looked back of the corporate fiction and based its decision upon the circumstance that, for all practical purposes, the Junction and your petitioner were one and the same. The Junction was performing services which no one today would argue were other than those of a common carrier; the tail went with the hide, and the Stock Yard Company was held to be such

a carrier in language that was wholly unnecessary for the decision of the most important issue in the case.

The court's conclusion as to petitioner's status for the purpose of enjoining it, in collusion with the other two companies, from paying what was equivalent to a rebate is clearly not in point now, for neither of the two circumstances (i.e. division of profits and unity of control) deemed controlling by the court in 1912 exists today. The commission erred in relying upon this decision as authority for its action in the instant case.

III

While the commission finds that conditions have changed, it seemingly attaches some importance to the fact that the petitioner is still the lessor of certain tracks now operated as part of the New York Central system and receives a substantial rental therefrom. In the indenture of December 1, 1913 petitioner granted, demised and leased its railroad properties and equipment to the Junction in perpet- [fol. 1430] uity. There is no defeasance clause in the indenture. Such a lease in perpetuity is in effect a conveyance of the fee under the Illinois law, and technically it is incorrect even to say that petitioner is the owner of such property. Chicago, Burlington and Quincy R. R. Co. v. Boyd, 118 Ill. 73, 75; Wiggins Ferry Co. v. Ohio and Mississippi Ry. Co., 94 Ill. 83, 93; Huck v. The Chicago and Alton R. R. Co., 86 Ill. 352, 354-5. In the case first cited the court said at page 75:

"It seems the 'Fox River Railroad Company' became unable to finish the construction of the railroad it had undertaken to build, and afterwards, in 1870, it granted and demised to complainant, in perpetuity, all its property, real and personal, and all the privileges and franchises it had under its charter from the State. *That was equivalent to absolute conveyance.*" (Italics ours.)

At the present time petitioner cannot exercise control of any character over the operation of the railroad properties formerly owned by it or in any way affect the service rendered or the rates charged, the control of which is the primary purpose of the Interstate commerce act. The fact that an adjoining property owner may have leased part of his land . a railroad as right of way and receives a rental

therefrom is a fact which in no way tends, either standing alone or together with other facts, to show that such landowner is a common carrier.

IV

The commission based its order in part upon the fact that petitioner is authorized under its charter to construct [fol. 1431] and operate a railroad. While the terms of a charter may possibly be of some importance in determining whether a carrier is public or private, they are of no significance in determining the primary fact as to whether a company is a common carrier.

In United States v. Brooklyn Eastern District Terminal, 249 U. S. 296, the court said at page 304:

"We need not undertake a definition of the term 'common carrier' for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad,' made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does. Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.

In Terminal Taxicab Company v. District of Columbia, 241 U. S. 252, 253-4, Mr. Justice Holmes said:

"The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does business in the District, and *the important thing is* [fol. 1432] *what it does, not what its charter says.*" (Italics ours.)

See also cases collected by the commission in Vol. 1, Interstate Commerce Acts Annotated, pp. 199-200, and in Vol. 6, pp. 4551-2, of the same work.

V

The commission reasons also that the term "transportation" as defined in the Interstate commerce act is broad enough to include unloading service, and further points out that if there is any doubt concerning this point, section 15 (5) is conclusive. The commission ignores the fact that the general definition of "transportation" in section 1 (3) of the act is intended to be broad enough to include all important services and facilities of companies which are in fact common carriers and does not purport to define who are such common carriers. As Mr. Justice Holmes remarked in Ellis v. Interstate Commerce Commission, 237 U. S. 434, 443-4:

"It is true that the definition of transportation in Sec. 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the *carriers* shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." (Italics ours.)

No one would contend that an icing company engaged by trunk line carriers merely to ice cars is a common carrier, or that its ice house is a railroad; yet such services and [fol. 1433] facilities are within the broad scope of "transportation" as defined in the act.

Prior to the enactment of paragraph 5 of section 15 it was the practice and custom of carriers to unload live stock at public markets, and the enactment of that paragraph did nothing more than to clarify the scope of the phrase "transportation by railroad" as applied to transportation of ordinary live stock to and from public markets and to provide specifically that the railroads might not make a separate charge against the shipper for such service. The defect in the commission's reasoning from the definition of "transportation" as found in section 1 applies equally to its reasoning with respect to section 15(5).

The commission likewise says that your petitioner is a common carrier because it has for many years held itself out to perform common carrier services, presumably having in mind those services which fall within the scope of the broad definition of "transportation." It is submitted that

this reasoning is also unsound. While the statute may make certain acts normally non-carrier in character transportation when performed by a common carrier, no amount of holding out to perform such acts or repeated performance thereof by a non-carrier company will change its status into that a common carrier.

Any conclusion that petitioner is a common carrier because it has filed tariffs with the commission for many years appears unwarranted. That action was taken under compulsion of a court decision when petitioner's status was materially different from what it is today, and the [fol. 1434] fact that it has only recently decided to undertake expensive litigation to uphold its rights in this respect does not make such holding out voluntary.

The fact that your petitioner has since 1922 invoked the jurisdiction of the commission does not cut off its right to take the position now asserted. Jurisdiction of subject matter cannot be conferred upon the commission by consent of the parties; nor can the right of a company to raise the question be waived by prior inconsistent conduct. Such jurisdiction flows solely from the statute, and not from the consent or agreement of a party nor from waiver or other similar circumstances. Grubb v. Public Utilities Commission, 281 U. S. 470, 475; Lambdin v. Commerce Commission (Ill.) 185 N. E. 221, 222; Malina v. Oplatka (Ill.) 136 N. E. 666, 668; Union Indemnity Co. v. Railroad Commission (Wis.) 205 N. W. 492, 496; Great Lakes Stages v. Public Utilities Commission (Ohio), 166 N. E. 404, 406.

VI

The commission relies strongly upon the supposed analogy between the position of petitioner and switching carriers which perform services as agent for trunk line carriers. The differences between such switching carriers and petitioner are vital. A switching carrier operates a railroad and it transports property by railroad from place to place. Operation and physical transportation from place to place are two indispensable characteristics of a common [fol. 1435] carrier by railroad. Wells Fargo & Co. v. Taylor, 254 U. S. 175, 187; United States v. Interstate Commerce Commission, 265 U. S. 292, 295-6; Washington v. Kuykendall, 275 U. S. 207, 211. Petitioner does not transport property nor operate a railroad. It has no tracks, no locomotives, no rolling stock of any character. It performs

only an incidental labor service which the trunk line carriers are obligated to render in partial consideration for their line-haul rates. This labor is performed as agent for the trunk lines precisely as icing is performed for such lines by many icing companies.

VII

The commission emphasizes the necessity of retaining jurisdiction over petitioner in order to carry out the purposes of paragraph 5 of section 15. Desirability of regulation does not confer jurisdiction. The primary purpose of the enactment of that paragraph, moreover, was to prevent the imposition of a separate additional charge on the shipper for the service of unloading and loading ordinary live stock at a public market, and the commission can carry out that purpose in a completely effective manner by its control over the trunk line carriers. Ellis v. Interstate Commerce Commission, 237 U. S. 434, 444. Even if the statute were intended to give the commission more extensive control over the service of loading and unloading, the commission can still carry out the purposes of this paragraph by its jurisdiction over the railroads publishing the through rates. Ellis v. Interstate Commerce Commission, supra.

[fol. 1436] But perhaps the best proof of the statements just made is the fact that at all of the 114 public stockyards in the country where stockyards companies load and unload animals the purposes of the act seem to be carried out notwithstanding the fact that the commission requires only your petitioner to file loading and unloading tariffs. If a rehearing is granted your petitioner will prove the facts mentioned in this section.

VIII

The commission fears the trunk line carriers, and ultimately the public, will suffer if barter-and-trade methods of fixing loading and unloading charges at Chicago are permitted. This fear is unfounded.

The Packers and Stock Yards act, 1921, provides that the secretary of agriculture shall have jurisdiction over "stockyard services," and defines that term as "services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery,

shipment, weighing, or handling in commerce, of livestock." (7 U. S. C., sec. 201 (b).) This language appears broad enough, standing alone, to cover the service of loading and unloading live stock at public stockyards, and it follows that if the commission has no jurisdiction over petitioner with respect to charges therefor the secretary of agriculture has such jurisdiction.

The Secretary so construes the act by allowing a considerable number of public stockyards to include such [fol. 1437] charges in the tariffs on file with him. If a rehearing is granted, your petitioner will prove that tariffs covering such charges are filed with the secretary by the stockyards companies in twenty cities,[1] and that the charges are paid by the trunk line carriers without protest.

Petitioner will also prove that at the National Stock Yards, where conditions are comparable to those at Chicago, the loading and unloading charges are not only collected by the stockyards company pursuant to tariffs filed with the secretary of agriculture under the Packers and Stock Yards act, but that this practice impliedly is recognized as proper by this commission by permitting a note to that effect to be carried in the tariff of the East St. Louis Junction Railroad Company, the carrier serving the yard. Petitioner will also prove that all of the protestants in this case which serve East St. Louis have long been paying such charges at the National Stock Yards without protest or question.

Petitioner states that if this commission or the courts hold that it is not a common carrier subject to the Interstate commerce act, it will file tariffs containing its loading and unloading charges with the secretary of agriculture and will submit to his jurisdiction with respect to the legality of such charges. Such action will adequately protect the trunk line carriers and the public against the imposition of [fol. 1438] any unreasonable or oppressive charges by your petitioner, since the secretary can be depended upon to perform his duty under the law.

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[1] Bushnell, Ill., Cleveland, Dayton, Evansville, Fort Wayne, Houston, Jacksonville, Fla., Los Angeles, Milwaukee, Montgomery, Nashville, National Stock Yards (East St. Louis), Peoria, Portland, St. Louis, St. Paul, San Antonio, San Francisco, Springfield, Ill. and Toledo.

Even if the secretary has no jurisdiction, the fact that trunk line railroads can deal with 113 other public yards without being oppressed, as petitioner will show if rehearing is granted, is convincing evidence that control of such charges by the commission is not essential.

IX

In its report the commission said at sheet 7:

"Respondent not only holds itself out to perform its service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery. Having attained this status, and having thereby rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common carrier functions to another corporation."

The strategic position of petitioner's yards does not affect the question involved. Few or no cities can support more [fol. 1439] than one public stockyard, and necessarily a major portion of all stock is unloaded at such yard. Packing plants are essential to a live stock market, and they are always located at or near the stockyard. Petitioner's situation in this respect is no different from that of other important yards. The general nature of the business, not any peculiar facts that exist at Chicago, is responsible for the condition that requires railroads to deliver most of the stock to petitioner's yard. Congress was aware of this situation, and had it intended to confer jurisdiction on the commission it would have so provided in unmistakable language. It is true that congress felt that public yards, because of their strategic location and the character of their business, should be regulated by it, but it saw fit to intrust such regulation to the secretary of agriculture. Stafford v. Wallace, 258 U. S. 495. There is, therefore, no

legal or other justification for the commission's singling out petitioner and by a strained construction subjecting it to jurisdiction other than that which obtains at other public yards.

This conclusion is in no way in conflict with the provision in the Packers and Stock Yards act, 1921, which preserves such jurisdiction as the commission may otherwise have over stockyards and their activities. When that act was passed, at least one trunk line railroad company was operating public stockyards and was performing its own unloading service. Since this company was in fact a common carrier, the unloading service which this carrier rendered might well have been subject to the jurisdiction [fol. 1440] of the commission. The effective enforcement of the purposes and provisions of section 15 (5) requires the commission to retain control over the rates which the public must pay on ordinary live stock until it is unloaded at a public market, and it is logical to conclude that congress intended to avoid any dispute on that score by clearly preserving the commission's jurisdiction over the trunk line carriers.

Nor is there any foundation for the faint suggestion of improper conduct on the part of petitioner contained in the last sentence of the portion of commission's decision quoted above. The protesting carriers or their predecessors, for their own convenience, caused the Stock Yard Company to be formed and played a controlling part in establishing its early status as a common carrier, and this commission itself, after an extensive hearing, specifically authorized the lease which changed the character of petitioner's public obligations. Even a public utility can change its status if proper public authority is obtained, as was done in the present instance.

The conclusion that petitioner's refusal to allow others to come upon its premises and perform a service tends to show that it is a common carrier needs no comment.

Petitioner, if a rehearing is granted, will prove the facts set forth in this section.

[fol. 1441] X

The commission believes that the decision of the supreme court in the Hygrade Case sustains its conclusions. The fact is that the court, although given the opportunity, did not find it necessary to pass upon the question of whether

or not your petitioner is a common carrier at the present time, and the commission should not read into the decision a finding that obviously the court did not see fit to make. The question was not raised in the case of Adams v. Mills, also mentioned in the commission's report, and was not passed on by the court. The transactions involved in that case occurred before the changes of 1922. (286 U. S. at 405.)

XI

Neither collectively nor severally do the reasons assigned by the commission in its report support the order which it has made in this case. The commission has erred, and your petitioner urgently requests that the case be reconsidered and that it be granted an opportunity to reargue the case before the full commission.

Another strong and unusual reason supports petitioner's request for reargument. This case was originally assigned to and argued orally before division 2, but the commission considered it of sufficient importance to take it away from that division and render a commission decision. One of the [fol. 1442] commissioners who listened to the oral argument did not participate in the decision. The result was that the decision was rendered by members of the commission of whom only two had heard the oral argument. The question at issue is one of great moment and petitioner believes that it is entitled to an opportunity to argue it before all commissioners who finally render the decision. A fair hearing contemplates such an opportunity and common justice demands it. New England Divisions Case, 261 U. S. 184, 200.

XII

The practical construction of an ambiguous statute by the commission charged with its interpretation and enforcement is always given great weight by the courts in determining its meaning. Boston & Maine R. R. v. Hooker, 233 U. S. 97, 118; Louisville & Nashville R. Co. v. United States, 282 U. S. 740, 757. In the present instance this commission is charged with the interpretation and enforcement of the provisions of the Interstate commerce act.

As indicated by the dissenting opinion, this commission has uniformly construed the act as not applicable to services or charges for loading or unloading live stock at stockyards other than that of petitioner. Petitioner, if a rehearing is

granted, will prove this fact and will also prove that at other stockyards where the circumstances are similar to those obtaining at petitioner's yard at Chicago or where the circumstances present a stronger case for the commission's jurisdiction, the commission has in no instance required the [fol. 1443] filing of loading or unloading tariffs or otherwise taken any steps to require such stockyards to submit to its jurisdiction. The character of the proof of conditions at other yards which petitioner will present, if a rehearing is granted, is shown by the following summary of conditions at the following typical yards:

National City (East St. Louis) Illinois: The stockyards are owned by St. Louis National Stock Yards Company. The railroad tracks serving the yards are operated by an affiliated corporation, the East St. Louis Junction Railroad Company, which is controlled through stock ownership by the stockyards company. These companies have common officers. Live stock coming from and destined to the west is handled by the Terminal Railroad Association of St. Louis to and from St. Louis over its rails and rails of the East St. Louis Junction directly to or from the unloading chutes. Other live stock is handled by the East St. Louis Junction from points of interchange with the trunk line carriers to the unloading chutes. The loading and unloading facilities are owned by the stockyards company. The labor of loading and unloading is performed by the stockyards company. The trunk lines pay the stockyards company for the loading and unloading service the charges named in its tariffs on file with the secretary of agriculture. The stockyards company files no tariffs with the Interstate commerce commission.

Kansas City, Missouri-Kansas: The stockyards are owned by Kansas City Stock Yards Company. The tracks serving the stockyards are operated by The Kansas City Connecting Railroad Company, which is affiliated with and [fol. 1444] controlled by the stockyards company, and which also owns the platforms and chutes. The two companies have common officers. The trunk lines operate with their own power direct to and from the chutes. The labor of loading and unloading is performed by the stockyards company. The trunk lines pay the stockyards company for the loading and unloading service charges which are not filed with any governmental body.

Omaha, Nebraska: The stockyards are owned by the Union Stock Yards Company of Omah Ltd. The tracks serving the yards are operated by South Omaha Terminal Railway Company, an affiliated corporation, which is controlled through stock ownership by the stockyards company. These two companies have common officers. Live stock is handled by the South Omaha Terminal to and from the chutes, which are owned by it. The labor of loading and unloading live stock is performed by employees of the stockyards company. The South Omaha Terminal pays the stockyards company for the labor of loading and unloading charges of the stockyards company which are not on file with any governmental body. The South Omaha Terminal assesses the trunk lines its charges for the loading and unloading service on file with the Interstate commerce commission.

Sioux City, Iowa: The stockyards are owned by the Sioux City Stock Yards Company. The tracks serving the yards are operated by an affiliated corporation, Sioux City Terminal Railway Company, whose stock is owned by the stockyards company. The two companies have common officers. The Terminal handles all live stock to and from the chutes of the stockyards company. The loading and unloading of live stock is performed by the stockyards com-
[fol. 1445] pany. The trunk lines pay the stockyards company for the loading and unloading service charges which are not filed with any governmental body.

St. Joseph, Missouri: The Stockyards are owned by St. Joseph Stock Yards Company. The tracks serving the yards are owned by St. Joseph Belt Railway Company, which is not affiliated with the stockyards company. The St. Joseph Belt handles all live stock to and from the chutes of the stockyards company. The labor of loading and unloading is performed by the stockyards company. The trunk line carriers pay the stockyards company for the loading and unloading service charges which are not on file with any governmental body.

South St. Paul, Minnesota: The stockyards are owned by St. Paul Union Stockyards Company. The tracks serving the yards are owned by the stockyards company and operated by a non-affiliated trunk line carrier under lease. All live stock is handled to and from the chutes of the stockyards company by this carrier. The labor of loading and unloading is performed by the stockyards company. The trunk

lines pay the stockyards company for the loading and unloading service charges named in the tariffs of the stockyards company on file with the secretary of agriculture. The stockyards company files no tariffs with the Interstate commerce commission.

Oklahoma City, Oklahoma: The stockyards are owned by Oklahoma National Stock Yards Company. The tracks serving the yards are owned by a subsidiary of the stockyards company and operated under lease by the Oklahoma Railway Company, which is not affiliated with the stockyards company. The Oklahoma Railway Company handles all [fol. 1446] live stock to and from the chutes of the stockyards company. The labor of loading and unloading is performed by the stockyards company. The trunk lines pay the stockyards company for the loading and unloading service charges which are not on file with any governmental body.

Wichita, Kansas: The stockyards are owned by The Wichita Union Stock Yards Company. The tracks serving the yards are owned by certain trunk line carriers but are laid on land of the stockyards company. All live stock is handled to and from the chutes of the stockyards company by the Wichita Joint Terminal Association, which is not affiliated with the stockyards company. The labor of loading and unloading live stock is performed by the stockyards company. The trunk line carriers pay the stockyards company for the loading and unloading service charges which are not on file with any governmental body. In its tariff filed with the secretary of agriculture the stockyards company provides a charge per car for the use of its loading and unloading docks and auxiliary facilities. This charge is paid by the trunk lines.

Cincinnati, Ohio: The stockyards are owned by The Cincinnati Union Stock Yard Company. The tracks serving the yards are owned by a non-affiliated trunk line carrier, which handles all live stock to and from the chutes of the stockyards company. The labor of loading and unloading live stock is performed by the stockyards company. The trunk line carriers pay the stockyards company for the loading and unloading service charges which are not on file with any governmental body.

Cleveland, Ohio: The stockyards are owned by The Cleveland Union Stock Yards Company, which also owns the [fol. 1447] tracks serving the yards. All live stock is handled to and from the chutes of the stockyards company by The New York Central Railroad Company, which is not

affiliated with the stockyards company. The labor of loading and unloading is performed by the stockyards company. The trunk line carriers pay the stockyards company for the loading and unloading service charges named in the tariffs of the stockyards company on file with the secretary of agriculture. The stockyards company files no tariffs with the Interstate commerce commission.

Denver, Colorado: The stockyards are owned by The Denver Union Stock Yard Company, which also owns the tracks serving the yards. These tracks are leased to and operated by certain trunk line carriers, which are not affiliated with the stockyards company, and which handle all live stock to and from the chutes of the stockyards company. The labor of loading and unloading live stock is performed by the stockyards company. The trunk line carriers pay the stockyards company for the loading and unloading service charges which are not on file with any governmental body.

New York, N. Y.: The stockyards are owned by The New York Central Railroad Company but are operated under lease by Union Stock Yards and Market Co., Inc., a non-affiliated corporation. The tracks serving the yards are owned and operated by the New York Central, which handles live stock switched to and from the chutes of the stockyards company. The labor of loading and unloading live stock is performed by the stockyards company. The New York Central pays the stockyards company for the loading and unloading service. The loading and unloading charges of the stockyards company are not on file with any governmental body.

[fol. 1448] Pittsburgh, Pa.: The stockyards are owned by Pittsburgh Joint Stock Yards Company, whose stock is largely or entirely held by certain trunk line carriers. These carriers handle all live stock to and from the chutes of the stockyards company. The labor of loading and unloading live stock is performed by the stockyards company. The charges for this service are paid to the stockyards company by the trunk line railroads and are not on file with any governmental body.

XIII

If a rehearing is granted petitioner will show in detail the practical difficulties of trying to serve two masters, and will show further that the situation as it now exists is not conducive to effective regulation of the activities of your petitioner. Petitioner will further show that the construction

of section 15(5) urged by it is in no way inconsistent with the provisions of the Packers and Stock Yards act, particularly with that provision which says that the secretary of agriculture shall have no jurisdiction over matters subject to the jurisdiction of the Interstate commerce commission. Petitioner will also prove any fact set forth in this petition which does not appear in the original record or concerning which a specific offer of proof is not hereinbefore made. If the effective date of the order of the commission is postponed petitioner will file the necessary sixth section application to prevent the cancellation tariff from becoming effective.

[fol. 1449] Wherefore, your petitioner prays that a rehearing, reconsideration and reargument be granted in this case, and that the effective date of the order of December 11, 1935 be postponed.

Respectfully submitted, Ralph M. Shaw, Mark W. Potter, Guy A. Gladson, Bryce L. Hamilton, Attorneys for Petitioner.

1400 First National Bank Bldg., Chicago, Illinois.
January 13, 1936

Certificate of Service

I hereby certify that I have this day served copies of the foregoing document upon all parties in the above entitled case by mailing copies, postage prepaid and properly addressed, to counsel for each such party.

Dated at Chicago, Illinois, this 13th day of January, 1936.

Guy A. Gladson, of Counsel for Petitioner.

[fol. 1450] Exhibit No. 19

In the District Court of the United States for the Northern District of Illinois, Eastern Division

In equity. No. 15024

The Union Stock Yard and Transit Company of Chicago, Plaintiff

vs.

United States of America, et al., Defendants

Stipulation

It is Hereby Stipulated by and between the parties hereto by their respective solicitors that the above entitled cause

be dismissed without prejudice and without cost to any of the parties.

(Sgd.) Ralph M. Shaw, Mark W. Potter, Guy A. Gladson, Solicitors for Plaintiff.

(Sgd.) Elmer B. Collins, Special Assistant to Attorney General of the United States.

(Sgd.) Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission.

Dated:

[fols. 1451-1454] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In equity. No. 15024

May 13, 1936.

Present: Honorable John P. Barnes, District Judge.

THE UNION STOCK YARD and TRANSIT COMPANY OF CHICAGO, Plaintiff

vs.

UNITED STATES OF AMERICA, et al., Defendants

Order

On Stipulation of the parties to this suit filed herein, it is Ordered that this cause be and the same is hereby dismissed without prejudice and without costs.

[fol. 1455] EXHIBIT No. 21

Quotation from Cross-examination by Mr. Gladson, Counsel for Yards Company of Howard D. Dozier, of Silver Spring, Maryland, Economist, Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture, in Docket 472 of Packers and Stockyards Division of Bureau of Animal Industry

"Q. Will you tell us just what bearing the financial history of the company and its dividend policy has in connection with arriving at a proper rate of return?

A. Yes.

Q. Will you do that, please?

A. The record shows that the company has been successful financially, that it has been able, both under regulation and before regulation, to earn money, and that it has had a capable management and that it can earn under good management in the future.

Q. It has, however, been financially successful for the most part, or at least during the longest period, without any regulation at all, hasn't it?

A. Oh, I should say that it was very successful without regulation.

Q. And that period of success extended from 1865 to 1921?

A. Yes, and on to the present time.

Q. And since 1921 the Secretary has not fixed the rates of the stockyard company?

A. Now, I shall have to answer that provisionally. There was a hearing here ten years ago to determine the reason-[fol. 1456] ableness of the rates. It is my understanding that as a result of that hearing the rates were not changed.

Q. So the success of the company has been from its inception without any practical regulation by the Secretary; perhaps I should say practically no regulation by the Secretary?

A. Why, I couldn't answer that in the affirmative. I take it that the Secretary is doing his duty with respect to this stockyard in regulating it.

Q. At least we can agree on the fact that the rates now charged are rates that have not been fixed by the Secretary?

A. No, I cannot agree on that. It may be that the Secretary approved the rates that are in effect, that were not changed as a result of the formal hearing.

Q. Nor any hearing?

A. So far as I know, nor any hearing.

Q. And the only way the Secretary can change the rates is after a hearing?

A. That is correct."

(pp. 3278-3279.)

EXHIBIT NO. 24

Reference to Tariff of Emergency Charges eliminated account expiration of such charges with December 31, 1966

SUPPLEMENT No. [illegible]
to
C. R. C. No. 47
(cancels Supplement [illegible] and contains all changes from the original tariff that are effective on the date hereof.)

SUPPLEMENT No. [illegible]
to
IND. R. C. No. 81
(cancels [illegible] and contains all changes from the original tariff that are effective on the date hereof.)

SUPPLEMENT No. [illegible]
to
ILL. C. C. No. 161
(cancels [illegible] and contains all changes from the original tariff that are effective on the date hereof.)

SUPPLEMENT No. 13
to
I. C. C. No. 339
(cancels Supplement No. 12 (Supplements Nos. 7, 10 and 11 contain all changes from the original tariff that are effective on the date hereof.)

ILLINOIS FREIGHT ASSOCIATION
TARIFF BUREAU
R. A. SPERRY, Agent

SUPPLEMENT No. 1
TO
CHICAGO SWITCHING COMMITTEE

TARIFF No. 20-U

For Individual Carriers' Tariff Nos. see page 2

NAMING

LOCAL AND JOINT

TERMINAL CHARGES, RULES AND REGULATIONS

FROM OR TO POINTS

WITHIN THE CHICAGO DISTRICT

NAMED ON PAGES 4 TO 6, INCLUSIVE OF TARIFF, AS AMENDED

ON

OUT-BOUND AND IN-BOUND FREIGHT TRAFFIC

ALSO

RULES GOVERNING INTERMEDIATE SERVICE ON FREIGHT TRAFFIC PASSING THROUGH THE SAID CHICAGO DISTRICT

SUPPLEMENT No. 1

TO

CHICAGO SWITCHING COMMITTEE

TARIFF No. 20-U

For Individual Carriers' Tariff Nos. see page 2

NAMING

LOCAL AND JOINT

TERMINAL CHARGES, RULES AND REGULATIONS

FROM OR TO POINTS

WITHIN THE CHICAGO DISTRICT

NAMED ON PAGES 4 TO 6, INCLUSIVE, OF TARIFF, AS AMENDED

ON

OUT-BOUND AND IN-BOUND FREIGHT TRAFFIC

ALSO

RULES GOVERNING INTERMEDIATE SERVICE ON FREIGHT TRAFFIC PASSING THROUGH THE SAID CHICAGO DISTRICT

ISSUED APRIL 29, 1937

EFFECTIVE MAY 31, 1937

(Except as otherwise provided herein)

Departures from the [illegible] authorized under permission of Interstate Commerce Commission No. [illegible]

Departures from the [illegible] authorized under special permission of Illinois Commerce Commission No. [illegible]

Issued by

[redacted]

Special Supplement covering substitution of highway vehicle service for rail [illegible]

(This CSC-1)

(Filed with U. S. A.)

[redacted]

1457

234

Supplement No. 13 To Chicago Switching Committee Tariff No. 2

RATE BASES

BASIS FOR RATES TO AND FROM FACILITIES LOCATED ON THE CHICAGO JUNCTION RAILWAY

Rate Basis No.	TO OR FROM THE FOLLOWING CARRIERS	FREIGHT TRAFFIC (Except Live Stock) CARLOAD AND TRAP CARS Apply Rate Basis No.	FREIGHT TRAFFIC (Except Live Stock) LESS THAN CARLOAD From Freight Houses Index Nos. 107, 413, 416 and 1205 of tariff, as amended. (Outbound only) Apply Rate Basis No.	LIVE STOCK FROM OR TO OR BETWEEN INDUSTRIES, CITIES OR SIDINGS OF THE UNION STOCK YARDS AND THEREOF CO., AT UNION STOCK YARDS CARLOADS Out-bound Apply Rate Basis No.	Out-bound Apply From (See Note 1) Per Car	In-bound Apply Rate Basis No.	In-bound Apply From (See Note 1) Per Car	LESS THAN CARLOAD (See Note 3) Apply Rate Basis No.	LESS THAN CARLOAD (See Note 3) Apply From (See Note 2) Per Shipment
	Alton	1		5	$ 2 70	5	$ 2 70	5	$ 2 70
	A T & S F	1	2	5	2 70	5	2 70	5	2 70
	B & O	1	2	5		5	1 35	5	2 70
	B & O C T	1	2	5					
	C & O	1	2	5		5	1 35	5	2 70
	C B & I	1	2	5	2 70	5	2 70	5	2 70
	C & E I	1	2	5		5	1 35	5	2 70
	C & N W	1	2	5	2 70	5	2 70	5	2 70
	C A & E	1	2						
	C B & Q	1	2						
Carrier Rate Basis	C C C & St. L	1	2	5	2 70	5	2 70	5	2 70
	C G W	1	2	5		5	1 35	5	2 70
	C I & L	1	2	5	2 70	5	2 70	5	2 70
	C M & St P & P (except Terre Haute Division)	1	2	5	2 70	5	2 70	5	2 70
	C M & St P & P Terre Haute Division	1	2	5	2 70	5	2 70	5	2 70
	C R I & P	1	2	5	2 70	5	2 70	5	2 70
	C R & I & B	1	2						
	G T	1	2	5		5	1 35	5	2 70
	I C	1	2	5	2 70	5	2 70	5	2 70
	I H Belt	1	2	5		5	1 35	5	2 70
	M C	1	2	5		5	1 35		
	M St P & S St M	1	2	5	2 70	5	2 70	5	2 70
	N Y C	1	2	5		5	1 35	5	2 70
	N Y C & St L	1	2	5	2 70	5	2 70	5	2 70
	Penn	1	2	5		5	1 35	5	2 70
	P M	1	2	5		5	1 35	5	2 70
	Wabash	1	2	5	2 70	5	2 70	5	2 70

Carriers named in first column will pay the Union Stock Yards & Transit Company the charges shown below for unloading Livestock over-bonds, consigned for delivery at the Union Stock Yards, Chicago, Illinois, into suitable pens at said Stock Yards, and for loading out-bound shipments of Livestock originating from said pens at the Stock Yards, Chicago, Illinois, viz.:

Ordinary Livestock:
- Loading or Unloading Single Deck Car $1.35 per Car.
- Loading or Unloading Double Deck Car $1.35 per Car.

On ordinary Livestock unloaded or reloaded enroute at the request of the shipper, consignee or owner or to try an intermediate market or to comply with quarantine regulations or reconsignment, the charges for loading, unloading or reloading will be in addition to the freight rate.

Other than Ordinary Livestock:
- Loading charge, 50 cents per car.
- Unloading charge, 35 cents per car.

The term "suitable pens" means the pen into or from which Livestock is loaded, unloaded or reloaded directly from or to the car.

For rules, regulations and charges governing shipments of Livestock moving through the Chicago Switch, see tariffs of individual lines and their publishing Agents lawfully on file with the Interstate Commerce Commission.

	C & E	1	2	5		5	1 35	5		3 60	
	C A N W	1	2	5	2 70	5	2 70	35		3 70	
	C A & E	1	2	5	2 70	5	2 70	5		3 70	
	C B & Q	1	2	5	2 70	5	2 70	5		3 70	
Can-	C C C & St L	1	2	5		5	1 35	5		3 60	
cels	C G W	1	2	5	2 70	5	2 70	5		3 70	
Note	C I & L	1	2	5		5	1 35	5		3 60	
Route	C M St P & P (except Terre Route Division)	1	2	5	2 70	5	2 70	5		3 70	
6	C M St P & P Terre Route Division	1	2	5	2 70	5	2 70	5		3 70	
	C R I & P	1	2	5	2 70	5	2 70	5		3 70	
	C S S & S B	1	2								
	G T	1	2	5		5	1 35	5		3 60	
	I C	1	2	5	2 70	5	2 70	5		3 70	
	I H Belt	1	2	5		5	1 35	5		3 60	
	M C	1	2	5		5	1 35				
	M St P & S S M	1	2	5	2 70	5	2 70	5		3 70	
	N Y C	1	2	5	2 70	5	2 70	5		3 70	
	N Y C & St L	1	2	5		5	1 35	5		3 60	
	Penn	1	2	5		5	1 35	5		3 60	
	P M	1	2	5		5	1 35	5		3 60	
	Wabash	1	2	5	2 70	5	2 70	5		3 70	

On ordinary Livestock reloaded or reloaded enroute at the request of the shipper, consignee or owner or to try or intermediate reloading to comply with quarantine regulations or reconsignment, the charges for loading, unloading or reloading will be in addition to the freight rate.

Other than feeding charge, $3 [illegible] each car.
Unloading charge, $6 each car.

The term "reloading point" means the point at which Live Stock is loaded, reloaded or unloaded directly from or to the car.

For rates, regulations and charges governing diversion or change in destination, stopping in transit for feed, rest or watering, and for other services in connection with the handling of Live Stock, see tariffs on file with the Interstate Commerce Commission.

Note 1.—EXCEPTIONS TO APPLICATION OF PLUS CHARGES IN CONNECTION WITH CARLOAD SHIPMENTS OF LIVE STOCK

(a) Plus charge of $2.70 or $1.35 per car indicated opposite the following carriers, viz:

Alton	C & N W	C M St P & P (Except Terre Route Division)	I C
A T & S F	C B & Q	C M St P & P (Terre Route Division)	M St P & S S M
C & E I	C G W	C R I & P	N Y C
			Wabash

will not apply to shipments of ordinary Live Stock originating at or destined to points in the following states:

Arizona	Michigan (Upper Peninsula)	Oklahoma
Arkansas	Minnesota	Oregon
California	Missouri (Except St. Louis)	South Dakota
Colorado	Montana	Texas
Idaho	Nebraska	Utah
Iowa	Nevada	Washington
Kansas	New Mexico	Wisconsin
Louisiana (West of Mississippi River)	North Dakota	Wyoming

nor to interstate shipments of ordinary Live Stock originating at or destined to points in Illinois north and west of the line of the C B & Q R R, East Burlington to Ferris, Ill.; thence the line of the T P & W R R through to Bureau, Buda-well, Cuba, Chatham, Pekin to Streator Junction, Ill.; thence the line of the A T & S F Ry. to Chicago, Ill.

Issued in compliance with order of the Interstate Commerce Commission in Docket No. 28227 dated December 7, 1926, as amended, March 12, 1927

(Note 1 continued on following page)

For explanation of other Notes and Reference Marks, see pages 10 and 11 hereto.

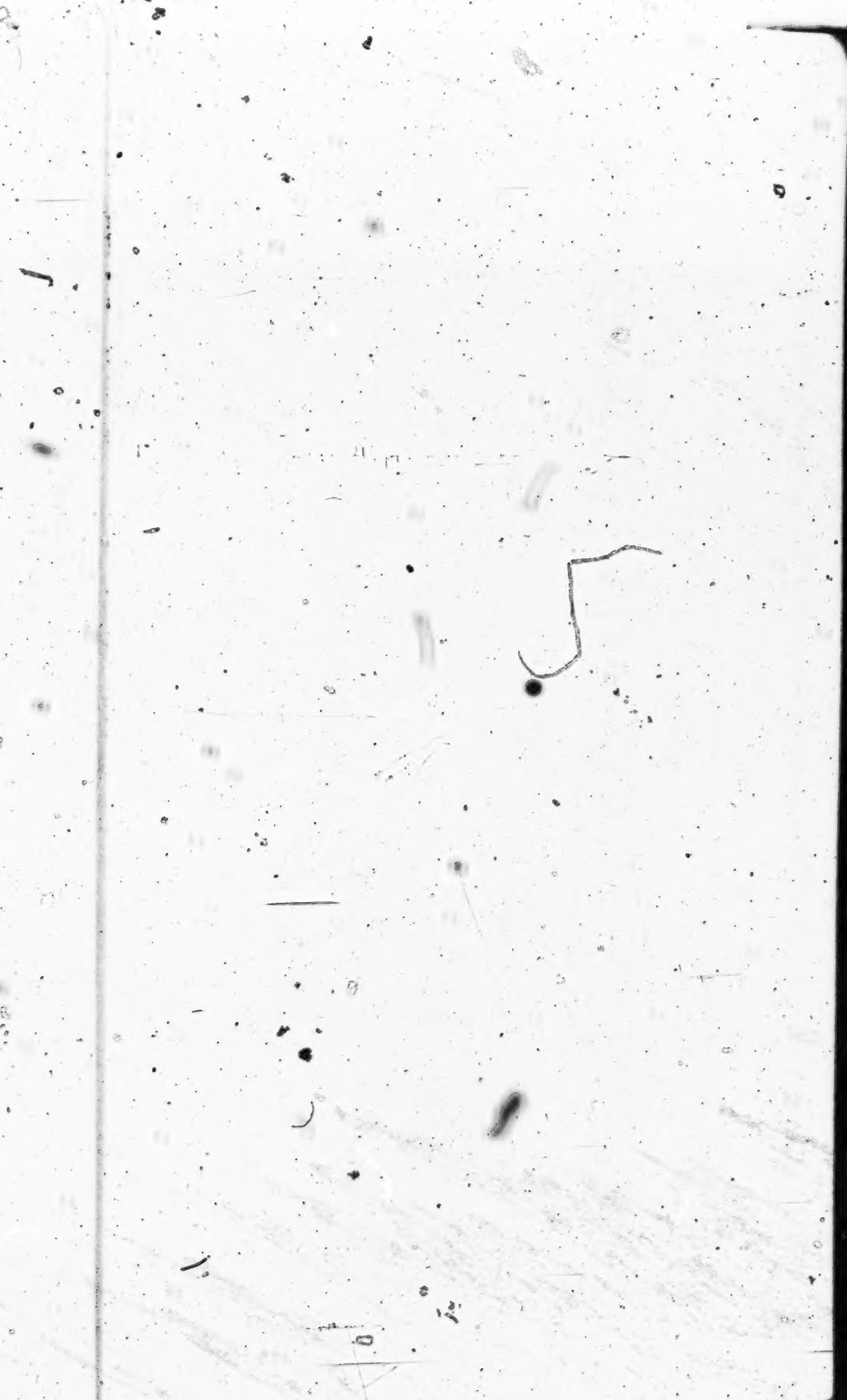


EXHIBIT NO. 28

RECEIPTS
AND
SHIPMENTS
OF

LIVE STOCK

AT

UNION STOCK YARDS
CHICAGO

FOR THE YEAR 1936

With Summary of Receipts and Shipments and Valuation of All Live Stock for the Term of Seventy-One Years Ending December 31, 1936

THE UNION STOCK YARD AND TRANSIT CO. OF CHICAGO

ARTHUR G. LEONARD
President

O. T. HENKLE
Vice President and General Manager

J. A. McDONOUGH
Vice President

1459-1467

Total Receipts, Valuation and Shipments of Stock for 71 Years

Year	Receipts	Valuation	Shipments
1865—5 days	19,810	No Valuation	No Shipments
1866	1,564,293	843,765,328	822,177
1867	2,207,661	42,375,241	1,013,031
1868	2,304,099	53,506,268	1,330,135
1869	2,406,567	60,171,217	1,491,250
1870	2,579,512	62,090,631	1,436,361
1871	3,344,149	60,231,082	1,704,779
1872	4,250,054	87,500,000	2,601,260
1873	5,511,201	91,321,182	2,906,513
1874	5,453,588	115,040,140	3,180,453
1875	5,363,347	117,533,942	2,533,910
1876	5,659,005	111,185,630	2,132,123
1877	5,377,235	99,094,100	1,816,575
1878	7,742,557	106,101,879	2,130,917
1879	7,999,654	114,795,834	2,587,819
1880	8,788,240	143,057,636	2,446,827
1881	8,838,875	183,007,710	2,536,903
1882	8,067,742	196,670,221	3,005,948
1883	8,314,964	201,252,772	2,687,982
1884	8,042,349	187,387,660	2,534,187
1885	9,924,507	173,508,002	2,854,008
1886	9,770,340	166,741,754	3,107,416
1887	9,325,985	170,644,507	3,110,689
1888	9,199,688	182,202,789	3,397,984
1889	11,057,170	203,321,924	3,966,832
1890	13,607,367	231,344,879	4,227,691
1891	14,304,480	239,436,775	4,853,587
1892	13,715,984	253,236,502	4,636,560
1893	12,514,907	349,542,377	3,576,231
1894	13,815,680	228,153,029	3,851,523
1895	14,182,513	200,584,380	3,479,379
1896	14,094,918	187,745,655	3,380,779

Total Receipts, Valuation and Shipments of Stock for 71 Years—Continued

Year	Receipts	Valuation	Shipments
1897	14,750,865	$316,305,396	3,223,709
1898	15,138,937	229,301,296	2,879,689
1899	14,623,435	233,711,180	3,006,538
1900	14,622,315	262,154,373	2,979,849
1901	15,657,162	283,955,239	3,217,955
1902	15,706,360	312,294,396	3,116,643
1903	15,713,515	288,152,707	3,628,130
1904	15,376,009	264,134,607	4,436,072
1905	16,380,850	300,472,480	4,229,644
1906	15,950,010	317,467,535	4,566,806
1907	15,248,479	319,202,239	4,423,071
1908	16,096,369	306,586,518	4,546,530
1909	14,491,372	323,607,543	3,977,545
1910	14,452,490	337,145,681	4,110,531
1911	16,397,492	339,484,990	4,144,572
1912	16,487,233	375,604,939	3,831,091
1913	16,452,807	409,134,374	4,204,743
1914	14,704,288	375,698,580	3,483,131
1915	16,012,313	370,938,156	1,931,438
1916	16,934,497	509,630,023	3,153,639
1917	14,991,663	630,612,550	3,022,055
1918	17,779,435	904,718,357	3,288,440
1919	18,215,603	880,853,091	3,674,639
1920	15,423,872	665,431,232	4,144,776
1921	16,485,315	427,291,788	4,714,872
1922	15,996,576	483,844,813	4,290,087
1923	18,801,883	504,151,375	4,910,603
1924	18,853,539	528,489,208	5,494,833
1925	15,853,406	541,873,748	4,530,775
1926	15,538,768	530,084,380	4,638,201
1927	15,152,091	492,637,471	4,102,815
1928	15,602,844	532,581,609	4,053,628
1929	15,057,185	531,375,784	3,734,735
1930	15,019,131	417,900,451	3,833,382
1931	15,281,427	263,245,493	3,947,217
1932	12,991,378	136,342,311	3,637,403
1933	13,850,891	187,305,943	2,000,989
1934	12,998,166	216,784,374	1,934,904
1935	8,989,295	250,861,099	1,693,943
1936	9,631,640	280,363,632	1,850,788
Total	859,737,255	20,428,376,548	231,410,828

Grand Total Combined Receipts and Shipments.....1,091,138,083

[fols. 1470-1520] PLAINTIFF'S EXHIBIT "B"

. . . . . .

XV. Applications for Further Hearings, Rehearings, Reargument, Reconsideration, or Modification of Orders.

(b) [Further hearing or reopening; statement as to new evidence.] If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative.

(Here follows 1 Photolithograph Side Folio 1521)

PLAINTIFF'S EXHIBIT "C"

Certificate Number 18969

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

FILED

MAR 9 - 1939

AT ... O'CLOCK

HOYT KING
CLERK

To all to whom these Presents Shall Come, Greeting:

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois do hereby certify that the following and hereto attached is a true photostatic copy of the Articles of Incorporation and all amendments thereto of THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois do hereby certify that the following and hereto attached is a true photostatic copy of the Articles of Incorporation and all amendments thereto of THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY,

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 17th day of September A.D. 1930.

Edward J. Hughes
SECRETARY OF STATE

1521

V882

[fol. 1522] The undersigned, for the purpose of organizing a railroad corporation under the laws of the State of Illinois, do hereby adopt the following:

Articles of Incorporation of The Chicago River and Indiana Railroad Company.

[fol. 1523] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 4, 1939

Comes now The Union Stock Yard and Transit Company of Chicago, the appellant in the above entitled cause, and adopts its assignment of errors as its statement of the points on which it intends to rely.

Appellant further states that it deems the following parts of the record necessary for the consideration of the case, and designates them for printing:

Transcript of Record	Page of Transcript of Record
Bill of complaint including exhibits attached thereto, one of which (Ex. F) is a copy of the order complained of and the report of the Commission thereon	3-74
Answer of Interstate Commerce Commission	80-84
Answer of United States of America	87-90
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Motion to intervene as party defendant filed by National Live Stock Marketing Association	132-133
[fol. 1524] Order allowing intervention of National Live Stock Marketing Association	135
Answer of intervener National Live Stock Marketing Association	137-144
Plaintiff's comments respecting and suggested modifications of defendants' proposed findings of fact	146-182

Transcript of Record	Page of Transcript of Record
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Final decree entered by Court on March 9, 1939	198
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Motion of plaintiff for amendment of findings and additional findings, and for amendment of final decree	204-230
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Jurisdictional statement	256-260
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Order approving bond	270
Order with respect to reporter's transcript of proceedings of final hearing	272
Reporter's transcript of proceedings in court on February 20, 1939	274-283
Notice to parties of appeal taken and acknowledgment of notice and documents served therewith	285-286
Notice to Attorney General of State of Illinois of appeal taken and acknowledgment of notice and documents served therewith	288-289
Praecipé for record	295-297

[fol. 1525] Original Exhibits:	Volume and Page of Original Exhibits
Petition of respondent for further hearing before final submission and for other relief, filed September 8, 1937—I.	104-151
Order of Commission entered November 8, 1937 denying petition for further hearing before final submission—I.	201

Original Exhibits:	Volume and Page of Original Exhibits
Exceptions of respondent to report proposed by Examiner Paul O. Carter, filed June 7, 1938—I.	431-469
Transcript of the stenographer's notes of the hearing held February 11, 1937, at Washington, D. C.—II.	593-673
Transcript of the stenographer's notes of the hearing held June 10, 11, 12, 14 and 16, 1937, at Chicago, Ill—II.	675-1209
Order and report of the Commission filed and entered May 16, 1922 in Finance Docket No. 1165, Chicago Junction Case, 71 I. C. C. 631—III.	1212-1231
Order and report of the Commission filed and entered December 3, 1928 in Finance Docket No. 1165, Chicago Junction Case, 150 I. C. C. 32—III.	1232a-1237
Report of the Commission filed and entered April 2, 1921 in I. & S. Dockets 1301 and 1312, Live Stock Loading and Unloading Charges, 61 I. C. C. 223—III.	1263-1265
Order of Commission entered November 21, 1938 in I. & S. Docket No. 4296, Cancelation of Live-stock Services at Chicago, postponing the effective date of order to January 1, 1940—III.	1342
Supplement No. 13 to The Union Stock Yard and Transit Company of Chicago tariff No. 9, I. C. C. No. 12—III.	1348
Act of Incorporation of Union Stock Yard and Transit Company of Chicago, being Exhibit 2 before the Interstate Commerce Commission —III.	1367-1371
Introductory paragraph, recitals and covenants of indenture of lease between The Chicago Junction Railway Company, Union Stock Yard and Transit Company of Chicago, The Chicago River and Indiana Railroad Company, and The New York Central Railroad Company, dated May 19, 1922, being a part of Exhibit No. 3 before the Interstate Commerce Commission—IV.	1376-1416

Original Exhibits:	Volume and Page of Original Exhibits
Lease from Union Stock Yard and Transit Company of Chicago to Chicago Junction Railway Company, dated December 1, 1913, being a part of Exhibit No. 3 before the Interstate Com- [fol. 1526] merce Commission—IV.	1502-1511
Agreement dated December 15, 1897 between The Union Stock Yard and Transit Company of Chicago and Chicago and Indiana State Line Railway Company, being a part of Exhibit No. 3 before the Interstate Commerce Commission—IV.	1512-1521
Supplemental indenture dated January 21, 1929 between Chicago Junction Railway Company, The Union Stock Yard and Transit Company of Chicago, The Chicago River and Indiana Railroad Company and The New York Central Railroad Company, being Exhibit No. 4 before the Interstate Commerce Commission—IV.	1564-1568
The Union Stock Yard and Transit Company Tariff No. 10 filed with Secretary of Agriculture, effective January 1, 1937, being Exhibit No. 6 before the Interstate Commerce Commission—VI.	1635-1635c
Title page and Pages 17-25 of brief on behalf of The Union Stock Yard and Transit Company of Chicago filed with the Supreme Court in The Union Stock Yard and Transit Company of Chicago v. The United States of America, et al., October Term, 1934, No. 607, being a part of Exhibit No. 14 before the Interstate Commerce Commission—VII.	1919-1927
Title page and Page 6, lines 4-22, of brief on behalf of Union Stock Yard and Transit Company filed with United States District Court, Southern District of New York, in Atchison, Topeka & Santa Fe Railway Company, et al., v. United States of America and Interstate Commerce Commission, in Equity No. 78-351, being a part of Exhibit No. 18 before the Interstate Commerce Commission—VII.	1955

Original Exhibits:	Volume and Page of Original Exhibits
Section IX, pages 8-12, of petition for resettlement of order and for rehearing filed by The Union Stock Yard and Transit Company with Interstate Commerce Commission in Hygrade Food Products Corporation vs. Atchison, Topeka & Santa Fe Railway Company, et al., I. C. C. Docket No. 24375, being a part of Exhibit No. 25 before the Interstate Commerce Commission—VII.	2001-2005
Petition of The Union Stock Yard and Transit Company for rehearing, reconsideration and reargument, filed with Interstate Commerce Commission in I. & S. Docket No. 4109, being Exhibit No. 16 before the Interstate Commerce Commission—VIII.	2084-2108
[fol. 1527] Stipulation filed in United States District Court for Northern District of Illinois, Eastern Division in The Union Stock Yard and Transit Company v. United States, et al., Equity No. 15024, to dismiss case without prejudice, being part of Exhibit No. 19 before the Interstate Commerce Commission—VIII.	2109
Order entered in United States District Court for Northern District of Illinois, Eastern Division, in The Union Stock Yard and Transit Company v. United States, et al., Equity No. 15024, dismissing said case without prejudice, being part of Exhibit No. 19 before the Interstate Commerce Commission—VIII.	2110
Quotation from cross-examination by Mr. Gladson of witness Dozier in Docket 472 of Packers and Stockyards Division of Bureau of Animal Industry, being Exhibit No. 21 before the Interstate Commerce Commission—VIII.	2156-2157
Title page and page 9 of Supplement No. 13 to Chicago Switching Committee tariff No. 20-U, effective May 31, 1937, being a part of Exhibit No. 24 before the Interstate Commerce Commission—IX.	2178 and 2180

Original Exhibits:	Volume and Page of Original Exhibits
Title page and pages 8 and 9 of Union Stock Yard and Transit Company seventy-first annual live stock report for year 1936 and summary for years 1865 to 1936, being a part of Exhibit No. 28 before the Interstate Commerce Commission—X.	2509, 2516 and 2517
Rule XV (b) on page 47 of Rules of Practice before the Interstate Commerce Commission, Revised to April 1, 1936—XI.	2782
Certificate of Secretary of State of Illinois and first five lines of Articles of Incorporation and all amendments thereto of the Chicago River and Indiana Railroad Company—XII.	2855-2856

Documents filed in Supreme Court:

Statement of points to be relied upon.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Thomas T. Cooke, Bryce L. Hamilton, Solicitors for Appellant.

Dated May 3, 1939.

[fols. 1528-1529] Proof of Service

Received a copy of the foregoing Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed this 3rd day of May, 1939.

Elmer B. Collins, Thurmon Arnold, William J. Campbell, H. N. Connaughton, Solicitors for United States of America, Daniel W. Knowlton, Solicitor for Interstate Commerce Commission, Kenneth F. Burgess, Douglas F. Smith, C. F. Martin, Jr., Solicitors for Intervening Railroads, Lee J. Quasey —L. W., Solicitor for Intervener National Live Stock Marketing Association.

[fol. 1530] [File endorsement omitted.]

[fol. 1531] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RE RECORD—Filed May 11, 1939

Whereas, counsel for the above named appellant, in their "statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed", filed with the Clerk of this Court on May 4, 1939, have designated for printing such parts of the Transcript of Record, including the exhibits introduced in evidence in the District Court, which were transmitted in their original form by that Court to the Clerk of this Court, as are now deemed by counsel for appellant and counsel for appellees to be essential for the consideration of the issues in this suit; but,

Whereas, the Record so transmitted by the District Court, and more particularly the original exhibits, consists of a large volume of oral testimony, documents and exhibits received in evidence by the Interstate Commerce Commission, many of which are difficult and impracticable of printing or reproduction, and

Whereas, the portions of the original exhibits which have not been designated for printing do not now appear to be essential for consideration of the issues in this suit, but reference to some portions of original exhibits not so designated for printing might become necessary in the consideration and disposition of the case, it is, therefore,

[fol. 1532] Stipulated and Agreed by and between counsel for the appellant and counsel for appellees that, with the approval of this Court, the entire Record as transmitted by the District Court to the Clerk of this Court shall be retained as the Record in this cause and that such portions of said Transcript and said original exhibits as have not been designated for printing may be referred to, if it becomes necessary, by the Supreme Court and by counsel for appellant and appellees in their briefs and upon oral argument in this Court.

May 10, 1939.

Ralph M. Shaw, Frederick H. Wood, William F. Riley, Guy A. Gladson, Thomas T. Cooke, Bryce L. Hamilton, Solicitors for Appellant, Robert H. Jackson, Solicitor General, Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Kenneth F. Burgess, Douglas F. Smith, Solicitors for Intervening Railroads, Appellees, Lee J. Quasey, Solicitor for National Live Stock Marketing Association, Appellee.

[fol. 1533] [File endorsement omitted.]

Endorsed: File No. 43,415 N. Illinois, D. C. U. S., Term No. 40. The Union Stock Yard and Transit Company of Chicago, Appellant, vs. The United States of America, Interstate Commerce Commission, et al. Filed May 4, 1939. Term No. 40 O. T. 1939.

MAY 4 1939

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. [redacted] 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

RALPH M. SHAW,
FREDERICK H. WOOD,
WILLIAM F. RILEY,
GUY A. GLADSON,
BRYCE L. HAMILTON,
Counsel for Appellants.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity.

No. 16200

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Plaintiff,

vs.

UNITED STATES OF AMERICA ET AL.,

Defendants.

JURISDICTIONAL STATEMENT.

On July 11, 1938, the Interstate Commerce Commission entered an order in a proceeding arising under Section 15(7) of the Interstate Commerce Act (49 U. S. C. A., Sec. 15(7)) (*Cancellation of Livestock Services at Chicago*, Investigation and Suspension Docket No. 4296, 227 I. C. C. 716) in which it required plaintiff to cancel, on or before August 17, 1938, certain schedules by which plaintiff proposed to cancel its tariff naming charges for loading and unloading carload shipments of livestock for railroads at its

stockyard in the City of Chicago, Illinois, and its tariff index. These were the only tariffs plaintiff had on file with the Interstate Commerce Commission. The schedules ordered cancelled recited that no tariffs would thereafter be filed with the Commission by plaintiff. Plaintiff sought to cancel its tariffs on the ground that it was no longer a common carrier subject to the provisions of the Interstate Commerce Act. The effective date of the order of the Commission has been postponed from time to time, and it will become effective on January 1, 1940, unless set aside by the courts.

On or about the 23rd day of August, 1939, plaintiff filed its bill of complaint in the District Court pursuant to the provisions of the act of October 22, 1913 known as Urgent Deficiency Appropriation Act (38 Stat. L. 219, 28 U. S. C. A., Secs. 43-48), asking the Court, among other things, to set aside the said order of the Interstate Commerce Commission and to enjoin its enforcement. A statutory court comprised of one circuit judge and two district judges was convened. On March 9, 1939, after final hearing, the Court refused to grant the relief requested by plaintiff, or any of it, and entered a final decree dismissing said bill of complaint.

Section 210 of the Judicial Code (28 U. S. C. A., Sec. 47a) provides in part as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title."

Section 44 of title 28 of the United States Code Annotated provides in part as follows:

> "The procedure in the district courts • • • (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title."

Section 238 of the Judicial Code (28 U. S. C. A. Sec. 345) provides in part as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise: • • • (4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The date of the final decree of the District Court sought to be reviewed is March 9, 1939, and the date upon which plaintiff's application for appeal is presented is April 7, 1939.

Under section 47a of title 28 of United States Code Annotated and section 345 of the same title, plaintiff under the facts here presented may take an appeal direct to the Supreme Court of the United States. Authorities which sustain this proposition are as follows: *United States* v. *Idaho*, 298 U. S. 105; *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; *Alton R. Co.* v. *United States*, 287 U. S. 229; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515.

A transcript of the oral opinion delivered at the close of oral argument on February 20, 1939 by the Honorable Evan A. Evans, speaking for the statutory court, is appended hereto.

Respectfully submitted,

RALPH M. SHAW,
FREDERICK H. WOOD,
WILLIAM F. RILEY,
GUY A. GLADSON,
BRYCE L. HAMILTON,
Solicitors for Plaintiff, The Union Stock Yard and Transit Company of Chicago.

Address for service: 1400 First National Bank Building, Chicago, Illinois.

Dated April 7, 1939.

EXHIBIT "A".

Opinion.

Justice EVANS:

In view of the amount of work which we have at all times on our table, we believe that in these three-judge cases we should dispose of them at the time of the argument, if we are all of us thoroughly convinced as to the soundness of the views which we hold are the prevailing views.

In the present case the question is one which doubtless will go further, but we have nevertheless approached it as though it was for us to determine, and we are satisfied that the decision in this case must be for the defendant; that the only question involved is one of jurisdiction and that, because of the definitions that are given to "common carrier" and to "transportation", the services rendered by the plaintiff make the plaintiff come within the provisions of the interstate commerce law. That is strengthened by the late decision of the Denver Stockyards case.

Under all the circumstances we have reached the conclusion that the judgment in this case should be for the defendant.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 21 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT

RALPH M. SHAW,
FREDERICK H. WOOD,
WILLIAM F. RILEY,
GUY A. GLADSON,
THOMAS T. COOKE,
BRYCE L. HAMILTON,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT

OPINION BELOW

The case below is unreported.

JURISDICTION

Final decree of the Court below dismissing appellant's bill of complaint was entered on March 9, 1939 (R. 119), and appeal allowed on April 7, 1939. (R. 154) The jurisdiction of this Court is invoked under Section 210 and Section 238(4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938. (28 U. S. C. A., Secs. 47a and 345) Probable jurisdiction was noted by this Court on May 22, 1939.

THE STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Packers and Stockyards Act, 1921, are set forth in Appendix A hereto.

STATEMENT

This is an appeal from a final decree of a statutory court for the Northern District of Illinois, dismissing the appellant's bill of complaint to set aside an order of the Interstate Commerce Commission, directing the appellant to withdraw a tariff whereby it sought to cancel its tariff theretofore filed with the Commission which names its charges for loading and unloading livestock at the Chicago stockyards as agent for the carriers. *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716. The record made before the Commission, including all exhibits, was introduced in evidence at the hearing in the District Court, together with two other exhibits. (R. 158-159, 164-739) No other evidence was received by the District Court.

1. History of the Case.

Appellant was incorporated by a special Act of the Legislature of Illinois in 1865. It was authorized by its charter to construct and operate a general Union Stock Yard for livestock, to erect and operate a hotel, and to construct and operate a railroad to connect its stockyard with the tracks of railroads terminating in Chicago. (R. 29, 645-650)

Thereupon it acquired approximately a half section of land in what is now the City of Chicago, and constructed a stockyard. This yard was opened for business on Christ-

mas Day 1865 and has since then been operated by the appellant. In addition to constructing a stockyard, appellant also constructed a hotel for the accommodation of its patrons, and a railroad connecting with the trunk-line railroads entering the City of Chicago and providing access to its yard. (R. 29, 228-230, 365)

Prior to 1887 appellant operated its facilities in its own name. From 1887 to 1893 the railroad facilities were operated by a transfer association controlled by the carriers. From 1893 to 1897 appellant operated both its stockyard and railroad facilities in its own name. In 1897 it leased its railroad tracks, property and equipment for a term of fifty years to the Chicago & Indiana State Line Railway Company, retaining for itself the loading and unloading platforms and other facilities used in connection with its stockyard business. (R. 29)

On January 1, 1898 the lessee company was consolidated with another railroad company and the consolidated company became known as Chicago Junction Railway Company, hereinafter referred to as the "Junction." (R. 29, 231) Under the terms of the 1897 lease appellant received from the original lessee, and subsequently from its successor, the Junction, two-thirds of the profits derived from the operation of the leased properties. (R. 29-30) The trunk-line railroads entering Chicago were granted trackage rights for the handling of livestock with their own equipment and crews over the railroad operated by Chicago & Indiana State Line Railway Company, and later by the Junction. (R. 30, 232)

In 1907 the Junction sold a belt line which it operated around the City of Chicago, retaining and operating

only those railroad properties owned by the appellant which had been leased by it under the fifty-year lease of 1897. (R. 30, 231-232) About the same time The Chicago Junction Railways and Union Stock Yards Company, a holding company organized under the laws of the State of New Jersey (hereinafter called the "New Jersey Company") acquired practically all of the stock of the appellant, as well as all of the stock of the Junction. (R. 30, 232)

In 1912 the United States, at the request of the Interstate Commerce Commission, brought an action against appellant, the New Jersey Company, and the Junction, to enjoin the payment of a bonus to a packing concern known as Louis Pfaelzer & Sons, and to compel appellant and the Junction to file tariffs and reports pursuant to the provisions of Sections 6 and 20 of the Interstate Commerce Act. (R. 30-31, 232) This Court in that case, *United States v. Union Stock Yard*, 226 U. S. 286, held that appellant and the Junction, because of their common ownership and collective activities, were engaged in the common enterprise of operating a railroad and hence were subject to the jurisdiction of the Interstate Commerce Commission.

As a result of this decision, appellant filed a tariff with the Commission naming its charges against the railroads for loading and unloading of rail-borne livestock. (R. 31, 233, 288) Practically from its inception appellant had performed this service for the trunk-line railroads and had been paid by them, and the filing of the tariff in no way changed this practice. (R. 34, 233)

On December 1, 1913, shortly after the decision of this Court in said case, the lease of appellant's railroad properties made in 1897 was cancelled and a new indenture executed by appellant and the Junction, in which appellant

granted, demised and leased its railroad property and equipment to the Junction in perpetuity at a fixed rental of $600,000 per year. (R. 31, 233, 681) This indenture contains no defeasance clause or other provision giving appellant the right to recover possession of the properties or equipment covered by the indenture. (R. 681-689) Thereafter appellant attempted to withdraw its tariff from the files of the Commission, but was prevented from doing so by an order of the Commission predicated primarily upon the ground that while an annual rental for the use of the railroad properties had been substituted for a division of earnings, as rental therefor, the affiliation between the operator of the railroad and the stockyards still continued. *Live Stock Loading and Unloading Charges,* 52 I. C. C. 209, 58 I. C. C. 164. (R. 31, 234-235)

On May 19, 1922 the Junction (with appellant consenting thereto) leased the railroad properties granted, demised and leased to it by appellant in 1913, together with some other railroad properties which it had acquired, to The Chicago River and Indiana Railroad Company (hereinafter called the "River Road") for a period of 99 years, and thereafter, at the election of the lessee, in perpetuity, at a fixed annual rental. At the same time all of the capital stock of the River Road was acquired by the New York Central Railroad Company. (R. 32, 235-240, 651) Upon the execution of the 1922 lease the Junction cancelled its tariffs and ceased doing business as a common carrier. (R. 239, 423) The making of the lease, the acquisition of the capital stock of the River Road, the cancellation of its tariffs by the Junction and its cessation of business were all done pursuant to law and with the approval and authority granted by the Interstate Commerce Commission in

Chicago Junction Case, 71 I. C. C. 631, 150 I. C. C. 32. (R. 32, 607, 631) Since the execution of the lease, the railroad business previously carried on by the Junction has been carried on by the River Road as a part of the New York Central System, over which neither the appellant, nor the Junction, nor the New Jersey Company has exercised or can exercise any control whatsoever. (R. 240-241, 298) Since the lease of the aforesaid railroad properties to the River Road, the appellant has neither operated nor been affiliated with the management or operation of any railroad, and has never shared in the profits of any common carrier by railroad. (R. 233, 240, 298, 356-357, 364-365, 651-680)

2. The Proceedings before the Commission.

In 1935 appellant filed tariffs with the Commission proposing to cancel its tariff then on file which named its charges for the loading and unloading of livestock at the yards as the agent of the railroads. These cancellation tariffs were suspended by the Commission, which on December 11, 1935 ordered their withdrawal. *Live Stock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. (R. 23, 28-42) Thereafter, appellant filed a petition for rehearing. (R. 245, 712) As stated in the Commission's report in the instant case:

> "The chief basis for the request for further hearing was an offer to prove that we had not required the filing of loading or unloading tariffs by stockyard companies located at other points where the circumstances and conditions in connection with the loading and unloading services were alleged to be similar to those obtaining at petitioner's yard. In this connection the Yard Company alleged that

the practical construction of the act by us had been that it was not applicable to services or charges for loading or unloading livestock at public stockyards other than Chicago. Descriptions of the alleged conditions existing at a number of other stockyards were included in the petition." (R. 23-24)

This petition the Commission denied.[1] (R. 245)

Thereafter appellant again filed a tariff with the Commission proposing to cancel its charges for the loading and unloading of livestock at the yards as the agent of the railroads. This tariff was suspended by the Commission in the investigation and suspension proceeding in which the order here assailed was entered. (R. 16-18, 20-21, 24)

On the hearing which ensued a record was made which not only contained the essential facts introduced in the previous case but also contained many facts designed to show that the conclusions of the Commission in the earlier case were wrong. Appellant also sought and attempted to show by specific facts that the Interstate Commerce Commission and public stockyards throughout the United States and the railroads serving such public stockyards had for many years by practical construction interpreted the Interstate Commerce Act as not applicable to stockyard companies which loaded and unloaded livestock for railroads. The Examiner of the Commission refused to receive this evidence. (R. 25-26, 538, 548-549) The general character of the rejected evidence and the purposes for which it was

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[1]The appellant also brought suit to set aside the aforesaid order of the Commission. After the denial of the petition for rehearing, appellant elected not to proceed with this suit on the record as made before the Commission, and it was dismissed without prejudice on stipulation of the parties. (R. 244-245, 728-729)

proffered are set forth in Section 10 of the bill of complaint (R. 8-11), and will be discussed in more detail hereinafter in the course of the argument.

Subsequent to the close of the hearing, appellant petitioned the Commission for a further hearing, seeking a review of the ruling of the Examiner excluding the evidence described, and praying that the Examiner be directed to receive the same, or, in the alternative, that the appellant be permitted "to make offers of proof of specific facts in respect of any such evidence not received, or deemed immaterial or irrelevant," a right which had been previously denied by the Examiner. (R. 26, 164-199) This petition the Commission denied upon the ground that "the status of other stockyards companies throughout the country was not material to the issue in this proceeding." (R. 26, 199) Thereafter the Commission entered its report and order directing the appellant to withdraw its cancellation tariffs, to set aside which this suit was brought. (R. 22, 55) The effective date of the order has been postponed to January 1, 1940. (R. 643)

3. Nature of appellant's business and service.

Appellant operates no railroad, transports no persons or property for hire, has no motive power or railroad equipment, and exercises no control, directly or indirectly, over and has no affiliation with any person engaged in the carriage of either freight or passengers. (R. 240, 298, 356-357, 364-365) It does not hold itself out to carry persons or property for hire, and does not possess or operate the facilities necessary to conduct such transportation. (R. 239-240) The District Court found that "Since May, 1922,

neither plaintiff [appellant] nor the Chicago Junction Railway Company has operated any railroad or transported any person or property." (R. 118)

Appellant's activities are confined to the operation of a public stockyards and its charges are subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act. (R. 241, 252-253, 576-602) As an integral part of its stockyards service, appellant loads and unloads livestock, but solely, as expressed in its tariff, "as a carrier's agent." (R. 16-17, 248-249) The charges which it receives for such service are paid by the railroads for which it is performed, and not by the shippers and owners of livestock. (R. 249) It is not itself a shipper, consignee or owner of livestock. (R. 334-335, 558) In connection with its loading and unloading service it provides the necessary platforms, chutes, pens and other facilities, and men trained in the performance of this sort of work who are familiar with the properties and methods of operation and able to keep the animals thus handled moving steadily through the yards, and to prevent any congestion or delay in the unloading of subsequent arrivals, or in connection with the loading of outbound shipments. (R. 252-258, 283-286)

4. The Report of the Commission.

The decision of the Commission was not unanimous. Mr. Commissioner Aitchison filed an opinion concurring "in the result" on the evidence before the Commission, but expressing the view that the objections to the excluded evidence relating to conditions at other yards should have been overruled, and that "what the decision would be with the proffered evidence before us cannot now be deter-

mined." (R. 42) Commissioners Meyer, Eastman and Porter dissented, each filing a separate dissenting opinion. (R. 42, 43, 45, 57) Commissioner Lee did not participate in the proceeding. (R. 55)

The division in the Commission did not turn upon any disagreement as to the essential facts of record—which were not and are not in dispute—but solely upon their legal effect. Since the questions of law upon which the Commission divided are those upon whose determination the decision of this Court must rest, it may be helpful to state the conclusions of the majority and minority respectively, and the reasoning upon which they were based.

4a. The Majority Report.

The majority report consists of two parts—the main report (R. 22-28) and an appendix (R. 28-42), the latter being a reprint of the Commission's report in the previous (1935) case. (R. 26). The main report is confined largely to a description of the steps taken by the appellant to bring about a reconsideration of the issue by the Commission, including a description of the nature of the excluded evidence sought to be introduced, first on petition for rehearing in the previous case, and second, at the trial of the instant case, and the action of the Commission thereon. Consequently the body of the report is to be found in the appendix.

In the appendix the majority reviews at considerable length the history of the appellant and the successive changes in its relation to the operation of the railroad authorized to be built by it under its charter (R. 29-32), substantially as set forth in the foregoing statement of facts.

Attempting to answer the appellant's contention that because of the fact that the prior decision of this Court in *United States* v. *Union Stock Yard, supra,* was based upon the then existing affiliation of the appellant with a company operating a railroad, it is no longer controlling (R. 32), the majority in the appendix to its report, among other things, said:

> "In the *Union Stock Yards* case, *supra,* the Court also said at page 305:
>
> "They [respondent and the Junction] are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."[2] (R. 34)

And in the main report the Commission supplements its observations in its previous report, as set forth in the appendix, by saying:

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[2]As evidenced by the argument which follows, it is the contention of the appellant (1) that whether a given person or corporation is a common carrier and as such subject to the jurisdiction of the Commission is to be determined not by its charter powers but by what it does; (2) that since the lease of its properties to the River Road, neither the appellant nor any corporation affiliated therewith holds itself out or acts in the capacity of a common carrier by railroad; and (3) that appellant is not treated by the great railroad systems which employ its services in the loading and unloading of livestock as a common carrier of such livestock by railroad or otherwise, but merely acts as an agent of such railroad systems for the performance in their behalf of a duty imposed upon them by the Interstate Commerce Act, and for which the Interstate Commerce Act forbids the exaction of any charge by them in addition to the line haul rate for the carriage of such livestock to or from the yards.

> "As stated, one of the contentions of the Yard Company is that in the lease of 1922, it divested itself of its common carrier status. We do not believe that such divestiture can be accomplished by contract."[3] (R. 27)

The majority report also points out that the loading and unloading of livestock at public stockyards are "transportation services within the definition of the Act" (R. 34), and are an inseparable part of the railroad transportation service. (R. 36) Although the majority report thus purports to be based in part upon the fact that the services performed are within the definition of "transportation", which the Act contains, and hence an indispensable part of the "railroad transportation" which the Act makes it the duty of the railroad companies themselves to perform, yet it expressly disavows a construction of the Act which would draw within the jurisdiction of the Commission all persons performing transportation services, as defined in the Act, as the agent of the railroads, saying:

> "We do not entertain the view that every terminal agency, performing for the railroads some service falling within the definition of 'transportation' contained in section 1 (3) could, or should, be held to be a common carrier subject to the act." (R. 39)

This caveat was obviously introduced into the majority report in recognition of the decision of this Court in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, in

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[3] In the argument which follows it is pointed out that the Commission itself, pursuant to the provisions of the Act, authorized the lease by reason of which appellant was divested of its common carrier status.

which the Court held that, although the Armour Car Lines was performing icing service for the carriers, a service also included within the statutory definition of transportation, the car line company was not itself a common carrier and as such subject to the jurisdiction of the Commission, and that the Commission's jurisdiction over charges for icing service was acquired solely through its jurisdiction over the railroads themselves which published and exacted such charges from the shippers. Nowhere in its report does the majority point out or give expression to any rule of interpretation, through whose application some persons performing, as agents of the railroad, an auxiliary service embraced in the statutory definition of transportation, thereby become common carriers, and hence themselves subject to the jurisdiction of the Commission, and others do not.

Throughout its report the majority lays great stress upon Sec. 15(5), providing that transportation of ordinary livestock in carload lots, destined to or received at public stockyards, shall include the service of loading and unloading, which shall be performed without extra charge therefor to the shipper, thus imposing upon the railroad company the duty of providing such service, either itself or through an agent, without additional charge.

The report concedes that in the performance of this service the appellant acts solely as the agent of the carrier in the execution of its duties to the shipper and performs no duties for the shipper as such, and collects no charges therefrom. (R. 41-42) The majority appears to have been of the view—mistakenly, we believe, as did also the dissenting minority—that by reason of the provisions of this Section an agent performing such service for the carrier and making no charge to the public therefor becomes a common

carrier, whereas other agents performing other services for the railroad—whether separately charged for or not—do not. The majority in its report assigns, however, no reason why a public stockyards company performing, as agent of the railroad company, a service which the Act requires the railroad to perform, and which is included within the definition of transportation, is a common carrier, while private car line companies, elevator operators, persons operating icing stations, as the railroad company's agent—whether by contract or otherwise—are not.

It also plainly appears from the report that the majority was influenced by its belief that the appellant was engaged in a public calling—as it is—, that all of its charges should be subject to public regulation, and that, unless it be held to be a common carrier, its loading and unloading charges are beyond the reach of public authority because, in the opinion of the majority, they are not among the charges over which the Secretary of Agriculture has jurisdiction under the Packers and Stockyards Act. (R. 38) Consequently the Commission finds that:

> "Since it [the appellant] is not a water carrier, a pipe line, or express company, in order to be a common carrier subject to the Act, it must be a common carrier by railroad." (R. 38)

This, although it carries nothing by railroad, or otherwise.

In respect of the Commission's assumption that unless the appellant's loading and unloading charges are subject to the jurisdiction of the Commission, they are beyond the reach of regulatory authority, it is the contention of the appellant (1) that the Commission may not usurp the legis-

lative power of Congress by the exercise of an authority not conferred upon it, and (2) that, as held by dissenting Commissioners, charges for all services performed by a public stockyards, including the loading and unloading of livestock, are within the jurisdiction of the Secretary of Agriculture, and that the majority's apprehension that unless a public stockyards, which carries nothing, be nevertheless deemed to be a common carrier, its loading and unloading charges are, under existing law, beyond the reach of public authority, is wholly groundless. (R. 45, 57)

4b. Dissenting Opinion of Mr. Commissioner Meyer.

Mr. Commissioner Meyer dissented for the reasons stated in his dissent in the previous case. (R. 42) His dissenting opinion in that case was short and is as follows:

> "If the conclusions set forth in this report be sound, this Commission has jurisdiction over every stockyard in the United States. I am not persuaded that Congress has given us such jurisdiction. I had supposed that the Department of Agriculture had been given jurisdiction over all charges for stockyard services, and that the fact that loading and unloading livestock are transportation services within the meaning of the act does not make every agent who performs such services a common carrier by railroad subject to the act. An individual may, and often does, perform for a common-carrier railroad a portion of its transportation service, but this does not make the individual who, like the Stock Yards Company, operates no railroad, a common carrier by railroad. In Docket No. 7008, *Atchison, T. & S. F. Ry.* v. *Kansas City S. Y. Co.*, 33 I. C. C. 92, this Commission unanimously held that the Kan-

sas City Stockyards Company was not a common carrier engaged in interstate commerce. Although many changes have taken place since that time, the basic principles discussed and relied upon therein are as sound today as they were then. The instant report is a reversal of those principles.

"If it is thought that this Commission should have jurisdiction over all services and charges of all stockyards, whether common carriers or not, we should ask Congress, rather than the Supreme Court, to bestow that jurisdiction upon us." (R. 57)

4c. Dissenting Opinion of Mr. Commissioner Eastman.

Mr. Commissioner Eastman filed a short separate dissenting opinion. In respect of the prior decision of this Court in *United States* v. *Union Stock Yard, supra,* upon which the majority so heavily relied, Mr. Commissioner Eastman said:

"The Yard Company, in my judgment, is not now a common carrier by railroad. Past decisions of the Supreme Court that it was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central.

"The facts that the Yard Company has a remote reversionary interest in part of the line of railroad, and that it has charter power to operate a railroad, including the right of eminent domain, do not make it a carrier by railroad. That is dependent upon what it does. Such attendant circumstances are at times of significance in determining the nature of what is done, but not otherwise. Nor is the Yard Company a carrier by railroad because, in the lease, it covenants to exercise its right of eminent domain at the request and for the benefit of the lessee. That

covenant is, in substance and effect, equivalent to a transfer of the right to the lessee along with the property." (R. 43)

Addressing himself to the circumstance that the statute made it the duty of the railroad company itself to provide a loading and unloading service without extra charge, he said:

"* * * The fact, however, that it is the duty of a railroad to deliver livestock at public stockyards into pens and to make sure that the latter are 'suitable' does not make the pens railroad premises, any more than the delivery by a motor carrier of shipments into the home or place of business of a consignee makes that home or place of business motor carrier premises.

"There is nothing to prevent a railroad, where it has the duty of loading and unloading freight, from performing the duty through an agent, and that is often done. In no instance that I know of, other than that now before us, has it been contended that an agent so employed by a railroad for the loading and unloading of freight is, because of such agency and employment, a carrier by railroad. * * *" (R. 43-44)

Addressing himself to the fact, stressed by the majority, that the railroads are required to employ the appellant to perform this service, and to the fear expressed by the majority that, unless the Commission has jurisdiction over the appellant's charges, it may exact exorbitant compensation for such services, he said:

"This fear, I believe, underlies the decision of the majority, and I am not prepared to say that it is a baseless or unreasonable fear, if the charges of

the Yard Company for this service are to go unregulated. That is, of course, not a reason for finding that the Yard Company is a carrier by railroad, but only goes to show that a situation exists which may be in need of remedy, perhaps by further legislation.

* * * * * * * *

"Why is it that the Yard Company is in a position to insist upon loading and unloading the livestock for the railroads and therefore to enjoy a virtual monopoly of this employment? The answer to this question, I take it, lies in the fact that the Yard Company is a public stockyards and that the loading and unloading of the livestock is so intimately related to the proper conduct of that public business that it cannot well be divorced therefrom and placed under separate supervision. As I see it, therefore, although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.

"While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. So far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextric-

able part of stockyards service. It follows, therefore, that the charges made against the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act.

"From an administrative standpoint, the division of duties which would result from this construction of the law would simplify matters, in comparison with the situation which will result from the decision of the majority. Under the latter decision, the Yard Company will be partly under the jurisdiction of this Commission and partly under the jurisdiction of the Secretary of Agriculture, involving much duplication of work. On the other hand, under the construction of the law which I believe to be sound, the Yard Company would be wholly under the jurisdiction of the Secretary of Agriculture." (R. 44-45)

4d. Dissenting Opinion of Mr. Commissioner Porter.

Mr. Commissioner Porter filed a separate and somewhat more elaborate dissent. Supplementing what had been said by Mr. Commissioner Eastman in respect of the non-applicability to the existing situation of the decision of this Court in the *Union Stock Yard* case, Mr. Commissioner Porter said:

"The record in the present case discloses that the Yard Company does not now operate any railroad tracks or equipment. In other words, I cannot find that it is literally within the provisions of section 1, paragraph 1, as a common carrier engaged in the transportation of passengers or property by any of the means there specified.

"In *United States* v. *Union Stock Yard*, 226 U. S. 286, the Supreme Court held that the Yard

Company was then a common carrier subject to the Act. *In so holding the court rested its decision upon the fact that the Yard Company and the Chicago Junction Railway were closely affiliated by the ownership of practically all of the shares of both by the New Jersey holding company.* At that time the Chicago Junction Railway was the operator as lessee of the railroad properties owned by the Yard Company. The Yard Company as a separate corporate entity was not engaged as a common carrier by railroad, but it was so closely affiliated with the railroad through ownership of the stock of both by the holding company that all three were deemed by the Supreme Court to be practically one concern. The courts have often disregarded corporate form and looked to the substance. Since that decision material changes have taken place. The railway properties owned by the Yard Company (which had been leased to the Chicago Junction Company) have since been leased to the Chicago River & Indiana Railway Company and all of the capital stock of the latter company has been purchased by the New York Central Railroad Company, these transactions having been approved by the Commission in the *Chicago Junction* case, 71 I. C. C. 631, Finance Docket No. 1165, decided May 16, 1922, subject to the 17 conditions there specified, one of which (No. 14) was later modified in a supplemental report, 150 I. C. C. 32. The present record shows that this lease and purchase of stock were effected May 19, 1922, immediately after the report of May 16, 1922.

"So that the connection between the Yard Company and the operator of the railroad has been severed. It is true the Yard Company is still affiliated with the corporation, the Chicago Junction Railway Company, *but the latter is no longer the operator of the railway.* It now occupies merely the status of a

non-operating lessor company. At this time there is no affiliation through stock ownership between the Yard Company and the operator of the railroad. It can not now be said that the Yard Company and the railway operator are practically departments of the same concern. The investment company no longer holds the controlling interest in both the Yard Company and the railway operator. The Supreme Court could not now say, as it did in the 226 U. S. 286, that 'these companies'—referring to the Yard Company and the Chicago Junction Railway Company—'because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act.' *In referring to the 'service rendered' by the two companies the Court obviously did not have in mind merely the loading and unloading service. It had in mind the service previously referred to in the opinion, namely, both the loading and transporting,* the Court having previously said that the Yard Company and the Chicago Junction Railway, together, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the Act and perform services as a railroad when they take the freight delivered to the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce.

"It seems obvious from the opinion that the Court could not find the Yard Company to be a 'common carrier by railroad' by reference to its service, status, and activities considered separately and apart from those of the railroad." (Italics ours.) (R. 46-48)

After referring to certain intervening decisions of the Commission and this Court, he ends his discussion by saying:

> *"The conclusion is inescapable* that the changes which have taken place since the Supreme Court's and the Commission's decisions above referred to have removed the basis of those decisions and that they are no longer authority for holding the Yard Company to be a common carrier subject to the Act." (Italics ours.) (R. 49-50)

Supplementing what had been said by Mr. Commissioner Meyer and Mr. Commissioner Eastman in respect of the fact that the service performed is within the definition of "transportation" as contained in the Act, he said:

> "The Yard Company performs certain services in connection with the receipt and delivery of property transported, namely, the loading and unloading of livestock shipped from and delivered at the Union Stock Yards by common carriers by railroad in interstate commerce, and plainly, therefore, it performs a transportation service, but this fact alone would not bring it within the provisions of the Act. A carrier may employ any person to perform its loading and unloading service, but the fact of such employment or agency does not alone make that person a common carrier. Often this service is performed by the shipper, and if under the circumstances it is the duty of the carrier to perform the service, then the shipper is performing for the carrier a part of its transportation service and may be compensated therefor under the provisions of section 15(13), as in the *Diffenbaugh* case, 222 U. S. 42, and many others. But this fact does not make the shipper a common carrier subject to the provi-

sions of the Act. The service itself is subject to regulation by the Commission by orders addressed to the railroad company. * * *

"In many instances throughout the United States independent stockyards companies (not owned or controlled by the railroad companies) perform the service of loading and unloading livestock for the railroads, as at Benning, D. C. (see *Adolph Gobel, Inc.* v. *Baltimore & O. R. R. Co.*, 200 I. C. C. 606), and at Cincinnati (see *E. Kahn's Sons Co.* v. *Baltimore & O. R. R. Co.*, 192 I. C. C. 705), but the Commission has never asserted jurisdiction over these stockyards companies on this ground." (R. 52)

After referring to and quoting from the decision of this Court in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, Mr. Commissioner Porter concluded his dissenting opinion as follows:

"It will be noted that the test there applied was whether the Armour Car Lines was in fact a carrier, that is, whether it carried anything. Here the Union Stock Yards, which does not operate a single foot of railroad, is in fact not a carrier by railroad. True, it still owns the railroad, and under section 20 of the Act may be required to file annual reports with the Commission, for that section empowers the Commission to require annual reports not only from common carriers subject to the provisions of the Act, but also 'from the owners of all railroads engaged in interstate commerce as defined in this Act.' But owners of railroads are not subjected to the other provisions of the Act by Section 1, and where an owner of a railroad has leased it to another, as in the present case, he is not a common carrier by railroad." (R. 55)

5. The Findings and Conclusions of the District Court.

The District Court made twelve findings which it called "Findings of Fact", although some of them (*e.g.*, Nos. 8, 9 and 11) are actually conclusions of law. In addition, it made five conclusions of law. (R. 116-119) The appellant took exception to all of these findings of fact and conclusions of law except Nos. 1 and 5 of the findings of fact. (R. 136) Finding of fact No. 1 stated the nature of the suit below. Finding of fact No. 5 read as follows:

> "Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

In addition to excepting to the District Court's findings and conclusions, appellant made a motion in the District Court for the amendment of its findings, for the allowance of additional findings, and for amendment of the final decree. (R. 121-140) It therein pointed out in detail wherein the Court's findings were erroneous and incomplete.[4]

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[4]The record references to the evidence in support of the appellant's requested findings are as follows: No. 2 (R. 123): R. 229, 645-650; No. 3 (R. 123-124): R. 229, 241, 252-253, 700A-700D; No. 4 (R. 125-126): R. 29-32, 230-240, 298, 423, 607, 631, 651, 681, 738A-739; No. 9 (R. 129): R. 248-249, 283-286; No. 12 (R. 130-131): R. 248-251, 254, 283-286; No. 1 (additional) (R. 131-132): R. 29-32, 34, 230, 241, 248-251, 254, 293; No. 2 (additional) (R. 132-133): R. 16-17, 240, 248-249, 254-255, 292-293, 365, 393-411, 440-441, 457, 586-587, 594, 599, 731-732; No. 3 (additional) (R. 133): R. 229-230, 248-249, 252-253, 576-599; No. 4 (additional) (R. 133-134): R. 164-199, and references to Record contained in Section IV of the argument, which follows; No. 5 (additional) (R. 135): R. 233, 239-240, 248-249, 254-255, 292-293, 298, 356-357, 364-365, 393-411, 440-441, 554-558, 651, 681.

The District Court's finding No. 6 contains a statement that "the only question in issue is the jurisdiction of the Interstate Commerce Commission to make the order" sought to be set aside, and that the plaintiff (appellant) does not question the "sufficiency" of the evidence to support the finding or of the findings to support the order. There are two questions in issue, viz., the jurisdiction of the Commission, and its failure, by reason of its rejection of certain evidence referred to in the foregoing statement, to accord to the appellant that full and fair hearing required by the statute. This refusal was assigned in the appellant's petition to the District Court as error. Moreover, whether the Commission had jurisdiction or not depended upon whether or not the appellant was a common carrier by railroad. If by this finding the Court meant to say that the appellant did not question the sufficiency of either the evidence or the findings to support the finding of the Commission that the appellant was such a carrier, then the Court's finding is clearly erroneous. Sufficiency of both the evidence and of the findings in this respect were challenged in the appellant's Bill of Complaint. (R. 13-14) The Court's finding was not only excepted to (R. 136), but the error of the Court's finding—if it is to be construed as above—expressly called to the attention of the Court. (R. 127)[5] That the fairness of the hearing was also in issue, see also not only Bill of Complaint but appellant's requested finding No. 10 (R. 113), appellant's requested conclusions of law, presented prior to the entry of the Court's findings, No. 3 (R. 116), appellant's requested

[5]See, also, appellant's requested finding No. 5 (R. 135) and Appendix to motion for amendment of finding (R. 136-140).

additional finding No. 4 (R. 133), appellant's conclusion of law No. 6 (R. 136), requested after the entry of the Court's findings and in connection with the exceptions thereto.

THE QUESTIONS PRESENTED

Sec. 1 of the Interstate Commerce Act provides:

> "That the provisions of this act shall apply to *common carriers* engaged in
>
> "(a) The transportation of passengers or property wholly by railroad, * * *." (Italics ours.)

Sec. 6 of the same Act requires that every common carrier subject to the provisions thereof shall file with the Commission schedules setting forth its charges.

Sec. 301 of the Packers and Stockyards Act provides:

> "Sec. 301. When used in this Act—
>
> "(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;
>
> "(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the *receiving*, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, *holding, delivery, shipment*, weighing, or *handling, in commerce*, of livestock;" (Italics ours.)

Sec. 304 of the same Act provides:

> "It shall be the duty of every stockyard owner * * * to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *."

Sec. 305 of the Act provides:

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner * * * shall be just, reasonable, and nondiscriminatory * * *."

Sec. 306 requires every stockyard owner to file with the Secretary of Agriculture schedules showing its rates and charges, and Sections 309, 310 and 311 confer upon the Secretary power, either upon complaint or in an inquiry instituted upon his own motion, to fix and prescribe reasonable rates for such services.

As appears from its legislative history, the purpose of the Packers and Stockyards Act was to confer upon the Secretary of Agriculture a jurisdiction over the rates for services performed by a stockyards company similar to that which had been conferred upon the Interstate Commerce Commission over railroad rates.

In view of the foregoing, the following questions are presented:

1. Is every public stockyard company in the United States—of which there are many—which loads and unloads livestock at its yards, as the agent of the railroad or railroads receiving and delivering livestock at such yards, a common carrier, and as such subject to the jurisdiction of the Commission in respect of its charges for loading and unloading, or are its charges for such service, like all other of its charges, subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act?

2. If in answer to the foregoing question it be held that such a public stockyard is not subject to the jurisdic-

tion of the Commission but to that of the Secretary of Agriculture, is there anything peculiar to the operations of the appellant at its stockyard which removes it from the rule applicable to stockyards generally, and by reason of which its charges for such service are subject, not to the jurisdiction of the Secretary, but to that of the Commission?

3. As appears from the foregoing statement and from the report of the Commission itself, the Commission excluded material evidence proffered by the appellant concerning the situation at other public stockyards, and the practical construction given to the Act, as applied to such yards, over a period of years by the Commission, the railroads and public stockyards. In addition to excluding such evidence, the Commission refused to permit the appellant to make specific offers of proof of the evidence it refused to receive or even to have exhibits containing such evidence marked for identification. (R. 164-199, 538, 548-549, 566) A third question, therefore, which arises is whether the appellant was denied that full and fair hearing to which it was entitled.

SPECIFICATION OF ERRORS

A specification of such of the points raised by the assigned errors as are intended to be urged is that:

1. The District Court erred in dismissing appellant's bill of complaint, and in failing and refusing to set aside the assailed order of the Interstate Commerce Commission. (Nos. 1, 2, 4, 9, 10; R. 142-143)

2. The District Court erred in failing and refusing to hold that the order of the Commission is void and beyond its power and jurisdiction; and erred in holding that the order is lawful, valid and within the jurisdiction of the Commission. (Nos. 3, 5, 8; R. 142-143)

3. The District Court erred in holding that appellant is a common carrier and subject to the regulation of the Commission; and erred in failing and refusing to hold that appellant is not a common carrier by railroad or otherwise, and is not subject to the provisions of Section 6 or other provisions of the Interstate Commerce Act, and is not required to maintain on file with the Commission any tariff stating its charges for the service of loading or unloading carload shipments of livestock. (Nos. 6, 11, 12, 13; R. 143)

4. The District Court erred in holding that appellant is engaged in the transportation by railroad of livestock in interstate commerce, and that its loading and unloading service performed for the railroads is an interstate transportation service subject to regulation and control by the Commission. (No. 7; R. 143)

5. The District Court erred in failing and refusing to hold that the Commission and its Examiner (a) erroneously and arbitrarily refused to receive evidence proffered by appellant to show that the Commission and public stockyards throughout

the United States and the railroads serving such yards have for many years by practical construction interpreted the Interstate Commerce Act as not applicable to public stockyard companies which load and unload livestock for the railroads; (b) erroneously and arbitrarily refused to receive evidence of any character pertaining to public stockyards other than appellant's yard which was proffered by appellant; (c) erroneously and arbitrarily refused to receive evidence proffered by appellant to show that in situations analogous to the loading and unloading of livestock at appellant's stockyard the Commission has never required the persons performing such services for the railroads to file tariffs; and (d) erroneously and arbitrarily refused to permit appellant to qualify its witness to give such aforesaid evidence, to permit appellant to ask questions of its witness designed to bring out such evidence, to permit appellant to have exhibits containing such evidence marked for identification, and to permit appellant to make specific offers of proof of such evidence. (Nos. 14, 15, 16, 17; R. 143-144)

6. The District Court erred in failing and refusing to hold that the order of the Commission is void because it was made and entered without according appellant a full and fair hearing as required by Section 15(7) of the Interstate Commerce Act and the Fifth Amendment to the Constitution. (Nos. 18, 19; R. 144-145)

7. The District Court erred in finding that appellant constructed trunk lines entering Chicago,

that the only question in issue in this case is the jurisdiction of the Commission to make the assailed order, that appellant does not question the sufficiency of the evidence to support the findings of the Commission or the sufficiency of its findings to support its order, and that appellant is a common carrier within the meaning of the Interstate Commerce Act; and also erred in finding, without qualifications as to application to appellant, that the loading and unloading services performed by appellant for the railroads are interstate transportation services within the meaning of the Interstate Commerce Act and subject to regulation by the Commission. (Nos. 20, 21, 22, 23, 24, 25; R. 145)

8. The District Court erred in failing and refusing to make each and every of the findings of fact requested by appellant in its motion filed March 20, 1939, pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of findings and additional findings, and for amendment of final decree. (No. 26; R. 145-152)

9. The District Court erred in failing and refusing to make each and every of the conclusions of law requested by appellant in its motion filed March 20, 1939, pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of findings and additional findings, and for amendment of final decree. (No. 27; R. 153)

SUMMARY OF ARGUMENT

I

A public stockyard company which loads and unloads livestock at its yard as agent of the carrier or carriers serving the same is not itself a common carrier by railroad, or otherwise, and its charges for such service are therefore not subject to the jurisdiction of the Interstate Commerce Commission.

1. Pertinent provisions of the Act, their scope and purpose.

2. A public stockyard is not a common carrier within the ordinary meaning of the term.

3. The term "common carrier" as employed in the Act has not been broadened beyond its ordinary meaning by the definitions of "transportation" and "railroad" which the Act contains so as to include persons performing transportation services as agents of the railroads, but not themselves common carriers. This Court has so held.

4. The interpretation placed upon the Act by the dissenting Commissioners is fully supported by the legislative history of the statutory definitions upon which the majority relies.

5. The far-reaching effect of the Commission's decision makes it plain that Congress did not intend to make persons performing services defined as trans-

portation, as agents of a carrier, themselves common carriers.

(a) As evidenced by the great variety of situations and persons affected.

(b) By reason of the subjection not only of public stockyards companies but of many other persons to the accounting and security provisions of the Act.

6. A public stockyard loading and unloading livestock for railroads, as their agent, does not become a common carrier by reason of Section 15(5) of the Act.

II

There are no facts or circumstances which distinguish the appellant from other persons or corporations performing transportation services, as the agent of the carriers, by reason whereof the appellant is subject to the jurisdiction of the Commission, and such others are not.

1. The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists.

2. The fact that appellant is authorized by its charter to operate a railroad—a fact noted by the Court in its prior opinion and referred to in the majority opinion of the Commission—does not constitute it a

common carrier as is evidenced by subsequent decisions of this Court.

3. The other factors referred to in the prior decision of this Court either no longer exist, or when disassociated from appellant's affiliation with a common carrier, are no longer of significance.

4. Mere ownership of a reversionary interest in railroad facilities does not make a non-operating owner of such interest a common carrier by railroad.

III

The setting aside of the Commission's order will not result in appellant's loading and unloading charges being unregulated. The Secretary of Agriculture, under the Packers and Stockyards Act, 1921, has full jurisdiction.

IV

The order of the Commission is null and void because of its failure to accord appellant the character of hearing required by law.

ARGUMENT

I

A PUBLIC STOCKYARD COMPANY WHICH LOADS AND UNLOADS LIVESTOCK AT ITS YARD AS AGENT OF THE CARRIER OR CARRIERS SERVING THE SAME IS NOT ITSELF A COMMON CARRIER BY RAILROAD, OR OTHERWISE, AND ITS CHARGES FOR SUCH SERVICE ARE THEREFORE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

1. Pertinent provisions of the Act, their scope and purpose.

Section 1(1) of the Interstate Commerce Act (49 U. S. C.), which defines and limits its application and jurisdictional coverage, provides:

> "Section 1. Regulation in general; * * *.—(1) Carriers subject to regulation.—The provisions of this chapter shall apply to *common carriers* engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *."[1]

In this connection, it is to be noted that the District Court found as a fact (R. 118) that:

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[1]By subsequent paragraphs of Section 1(1) the Commission's jurisdiction is confined to common carriers engaged in interstate transportation, and is extended to the transportation of oil by pipe line. Part II of the Act, known as Motor Carrier Act, 1935 (49 U. S. C. §§ 301-327), extends the Commission's jurisdiction to motor carriers. None of the provisions noted is material to the issues presented by this case.

"Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

Paragraph (3) of Sec. 1 provides in part:

"(3) The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid *as common carriers for hire*. Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier'."

With exceptions here immaterial, the Act thus applies only to persons and corporations which are in fact common carriers. *Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, 174.

Paragraphs (3) and (4) of Sec. 1 also provide:

"The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

"(4) It shall be the duty of every *common carrier* subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor.* * *"

Sec. 6(1) provides:

"Every *common carrier* subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad. * * * The schedules printed as aforesaid *by any such common carrier* shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, *and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require,* all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

The Act thus makes it the duty of every common carrier by railroad subject to its provisions to furnish the auxiliary and accessorial services included within the definition of "transportation", and to file its charges therefor, whenever a separate charge is exacted from the shipper for their performance, whether performed by the carrier itself or through an agent. The Act does not in terms subject the charges of such agent to the jurisdiction of the Commis-

sion, but only when adopted by the carrier, as charges made by it to the public, and then through its jurisdiction over the carrier.

The Act does not confer upon the Commission jurisdiction over the payments to be made by the carrier to its agent for performing services any more than it confers upon the Commission jurisdiction over any other expense incurred by the carrier in the performance of its duties. The only exception is that if the agent's services are performed in connection with transportation of property of which such agent is the owner, payments to be made therefor become subject to the jurisdiction and control of the Commission by Sec. 15(13).[3] The purpose of this provision is to prevent the payment of indirect rebates through the making of excessive allowances for services performed or facilities furnished by "the owner of property transported." The appellant is not a shipper of livestock. (R. 335, 558) Hence this Section has no application to the payments made to it by the railroads for the loading and unloading of livestock.

In addition to the requirement of Sec 1(4) that the railroads shall furnish, upon request, all services within

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[3]Sec. 15(13) provides:

"(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

the definition of "transportation", Sec. 15(5) specifically requires the railroad carrier to load and unload livestock at public stockyards as a part of the transportation service to be performed by it and "without extra charge therefor to the shipper." The appellant's charges, therefore, not only are not paid by the shipper, but could not be required to be paid by the shipper, whether through the adoption thereof by the carrier or otherwise.

Except for the Packers and Stockyards Act, which subjects charges for all stockyards services, including those furnished in connection with the "receiving * * * holding, delivery, shipment, weighing, or handling in commerce of livestock," to the jurisdiction of the Secretary of Agriculture, it would appear that payments to be made to a public stockyards for the loading and unloading of livestock, as the agent of the carrier, would be solely a matter of contract between the carrier and the yards. Under the Packers and Stockyards Act, however, as we construe it, such charges would appear to be, and we think clearly are, subject to regulation by the Secretary of Agriculture, and are required to be covered by schedules filed with him by such yards.

If a public stockyards performing loading and unloading service as agent of the carriers, and other business corporations performing services within the definition of "transportation", as agents for the railroads, thereby themselves become common carriers, they are subject to the accounting provisions of Sec. 20, and may keep only such accounts as and in the form prescribed by the Commission. Likewise they may not issue securities without the approval of the Commission, as required by Sec. 20a. It is hardly conceivable that Congress so intended

Yet such is the inevitable consequence if, by reason of the definition of "transportation" contained in Sec. 1, the term "common carrier" has been broadened beyond its ordinary meaning, so as to include any person performing such service as the carrier's agent.

2. A public stockyard is not a common carrier within the ordinary meaning of the term.

The meaning of the term "common carrier" is nowhere defined in the Interstate Commerce Act, and resort must be had to the common law. *Manufacturers Ry. Co.* v. *St. L. J. M. & S. Ry. Co.*, 21 I. C. C. 304, 312. A common carrier was defined by this Court in *Washington* v. *Kuykendall*, 275 U. S. 207, where, at page 211, the Court said:

> "Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier."

See also *Dwight* v. *Brewster*, 1 Pick. 50, 53 (Mass.); and *Propeller Niagara* v. *Cordes*, 21 How. 7, 22.

The sole business of appellant *at this time*, whatever it may have been in the past, is that of maintaining and operating a public stockyard. (R. 241, 252-253, 576-602) A part of this stockyard service is loading and unloading livestock for railroads. (R. 241-253) Neither such maintenance and operation in general nor the loading and unloading of livestock are common carriage. The courts have so held.

In *Cotting* v. *Kansas City Stock-Yards Company*, 82 Fed. 839 (C. C. Kans.), the question before the Court was

whether or not a state statute fixing the charges for stockyard services at the Kansas City stockyard was valid. The contention was made that the state had no authority because Congress had occupied the field upon the enactment of the Interstate Commerce Act. In its opinion the Court said (pp. 842-843):

> "It is contended that Congress has taken such action in the matter of the shipment and transportation of this live stock as would prohibit the state from passing the act in controversy, and stress is laid especially upon the interstate commerce act. It will be observed that this act, by its terms, is confined to common carriers engaged in the transportation of persons and property by rail or water, or both, and includes all instrumentalities of such shipment or carriage. * * * *it cannot be said that the stock-yards company is in any sense a common carrier. The master's report shows that the company neither owns, operates, nor uses any railway motive power or rolling stock.*" (Italics ours)

The decision of the lower court in this case was reversed in this Court, *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, on the ground that the Kansas statute violated the Fourteenth Amendment in that it applied only to the Kansas City yards. In the course of its opinion, however, the Court said of this stockyard, at page 85:

> "*While not a common carrier*, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation." (Italics ours)

In *Nebbia* v. *New York*, 291 U. S. 502, this Court, speaking of stockyards generally, said at page 536:

> "A stockyards corporation, 'while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest,' and its charges may be controlled. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, 85."

Mr. Justice Van Devanter, while a circuit judge, in *Union Stockyards Co. of Omaha* v. *United States*, 169 Fed. 404 (C. C. A. 8th), where it was held that the Omaha stockyard was a common carrier engaged in interstate commerce, but only because it carried livestock for hire over its tracks, said, at page 406:

> "It must be conceded that *the stockyards company would not be a common carrier*, nor the property used by it a railroad, *if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom*, and to feeding, watering, caring for, and otherwise handling live stock therein." (Italics ours)[3]

In *Mann* v. *White River Log & Booming Co.*, 46 Mich. 38, 8 N. W. 550, the question involved was whether or not a booming company engaged in the business of driving and

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[3]There are also some other cases in which certain stockyard companies have been held to be common carriers, but they were actually transporting livestock by railroad, not merely loading and unloading it from railroad cars. *United States* v. *St. Joseph Stockyards Co.*, 181 Fed. 625; *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556; aff'd, 167 Fed. 126; see also *Fesser* v. *Chicago and Illinois Midland Ry. Co.*, 193 Ill. App. 432, 267 Ill. 418, 108 N. E. 709 (National Stockyards Company, East St. Louis); and *State* v. *Union Stockyards Co. of Omaha*, 81 Neb. 67, 115 N. W. 627.

booming logs was liable as a common carrier for its failure to deliver at destination all of the logs delivered to it at point of origin. The Court held it was not subject to the common law liabilities of common carriers, saying (8 N. W. 550-551):

> "The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage. It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. Laws, Sec. 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for. These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.
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> * * * * * *
>
> "Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are quite as analogous as carriage. Drovers—or as the common law calls them agisters—perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs.

No one regards drovers as carriers. Angell on Carriers, Secs. 24, 52; Story on Bailments, Sec. 443."

The above conclusions are strongly reinforced by the relationship between services performed by appellant in loading and unloading railroad cars to the remainder of the stockyard services rendered by it. Mr. Henkle, appellant's Vice-President and General Manager, gave some graphic testimony in this connection:

"The services which the Stockyards Company performs for the railroads are essentially stockyards services or are incidental to the rendering of stockyards services. Whatever the law or the lawyers may say about the legal character of loading or unloading of livestock at public markets, it is in its nature a stockyards, not a railroad, service.

"Loading and unloading facilities must be immediately adjacent to or a part of the yards where the stock is bought or sold. Livestock is a perishable commodity, the bulk of which must be sold on the day of arrival. It shrinks if driven on foot any considerable distance and may become stale and less valuable if held over.

"Inbound shipments must be unloaded and moved out of the way promptly to prevent delay to following trains. They must reach the pens of the commission men in sufficient time to permit the animals to be sorted, fed, watered, and otherwise prepared for the market which opens early in the day. Most of the rail stock arrives between midnight and daybreak. * * * many of the alleys and pens used in this service can be and are used for other stockyards purposes. * * * the railroads could not perform this service efficiently, and the respondent could

not properly serve its non-railroad patrons if it permitted the railroads to try. Loading and unloading must be done by a personnel long trained in the handling of livestock. The stock must be driven out of the cars, across the unloading platforms, and down the chutes quickly and without injury to animals or men. This must be done in all kinds of weather and at all hours of the day.

"The work would be extremely hazardous for an inexperienced man. Much of the western stock has never been confined even in a pen before it started on its railroad journey. Many of the bulls shipped to market are powerful and vicious. Anyone who has tried to drive a single calf in his boyhood days can easily conceive of the art and experience required to handle a carload.

"Sheep are reluctant to enter a pen that has been occupied by other animals and have other idiosyncracies. Only one with long practical experience and knowledge of sheep psychology can load or unload them efficiently. Even the employees of the packers, mostly men with experience in handling sheep, sometimes have to use a trained goat to make their task easier.

"Cars of hogs, cattle, calves, and sheep are likely to be found in nearly every train and often different kinds of stock are found in the same car.

"The animals must be counted when driven out of the chute pen in the alley. The alley in front of the chute pens is one of the important ground-level thoroughfares in the yards, is nearly always in use, and there can be no delay in counting animals out of the chute pens into it without tying up traffic along the line. Most of this counting is done at night. It must be done accurately and quickly. Only an expert can count animals, particularly sheep, hogs, and calves, quickly and accurately under these con-

ditions. The counting of sheep is not done by individual animals but in small groups, and the same is true as to hogs.

"The men who handle yard stock from the chute pens must know how to handle stock in the alleys to prevent mixes, to prevent impeding other traffic, and to prevent other losses, and they must be thoroughly familiar with the location of pens, alleys, inclines, and viaducts, not only those used in this service but used in handling other yard animals.

"They must also know the location of cross-gates and be familiar with their operation to stop any run-away animals or groups of animals. They must also know the rules and regulations and practices obtaining at the yard and be able to keep the records required.

"The employees of the Stockyards Company have been trained in this work for years. The original employees handling the loading, unloading, and yarding of railroad stock at the time the yards were opened in 1865 were largely men who had been engaged in livestock production on farms and ranches. These men were succeeded by their sons and there are now many families whose third generation is engaged in doing the same work done by their grandfathers.

"Most of the men employed in loading or unloading have had long experience in other stockyards services and have learned to handle and count livestock, know the rules and regulations, and practices of the yards, know how to prepare its records, know the physical layout, and know the location of the various firms and facilities of the company. The work of loading and unloading is much the same as these other services.

"Even if the railroads could acquire the necessary personnel, respondent could not afford to allow

divided supervision of employees in the vicinity of the unloading chutes. The even and efficient flow of traffic essential to successful operation of a live-stock market would inevitably be seriously interfered with to the detriment of all the patrons of respondent." (R. 283-286)

3. The term "common carrier" as employed in the Act has not been broadened beyond its ordinary meaning by the definitions of "transportation" and "railroad" which the Act contains so as to include persons performing transportation services as agents of the railroads, but not themselves common carriers. This Court has so held.

The majority opinion is based in part upon the fact that the services performed by the appellant are among those within the definition of "transportation", which the Act contains. Although disavowed by it, the logic of the majority's contentions inevitably would lead to an interpretation of the Act whereby any person—not himself a common carrier within the ordinary meaning of the term—would become one, and as such subject to the jurisdiction of the Commision, by the performance of any service within the statutory definition of "transportation" as the agent of an interstate railroad company. In *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, and again in *United States* v. *Interstate Commerce Commission,* 265 U. S. 292, this Court held that the effect of these definitions was not to make common carriers out of persons performing services for a railroad company and who were not themselves common carriers. These decisions are, we think, conclusive upon the point in question, and fully support the observations and contentions of the dissenting Commissioners, to which we have already referred.

Stripped of its verbiage, the reasoning of the majority of the Commission was succinctly disposed of by Mr. Justice Holmes in rendering the opinion in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, wherein he said (pp. 443-444):

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. *It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars.* The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. *The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act.* The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself." (Italics ours.)

In *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 296, where the question involved was whether or not a private car company was a "carrier by railroad" within the guaranty provisions of the Transportation Act, 1920, the Court, after quoting with approval a substantial portion of the statement just quoted, said:

> "We need not review the arguments and contentions made here to the contrary. It is enough to say, that under the facts the Car Company is not a carrier by railroad, or, indeed, *a common carrier at all*, within the ordinary acceptation of the words, and there is nothing in the terms of the Transportation Act which suggests a different view." (Italics ours.)

In recognition of these decisions, the majority of the Commission disavows giving to the Act an interpretation whereby all persons performing transportation services as agents of a carrier thereby become themselves common carriers, but suggests no rule of interpretation by which some thereby become common carriers and others not. Congress either intended by the provisions in question to make all such agents common carriers or it did not. If any are, all are; and if one is not, none is. Nor it is without significance that these cases related to the particular type of agencies upon which attention was chiefly centered by the Commission in the making of its recommendation, by the committees in their reports and in the debates in Congress out of which the provisions in question grew, to wit: private car lines. (See discussion of legislative history, *post*, pp. 51-58.)

These cases also dispose of the contention, pressed below, that the appellant is a common carrier because the services which it performs are not only within the definition of transportation but are rendered through the use of facilities

owned by it within the definition of the term "railroad". As to this, the cases cited are likewise controlling. As appears from the foregoing excerpt from the *Armour Car Lines* case, that company, in addition to furnishing cars, owned and operated icing stations from which it iced and re-iced cars. These icing stations are clearly "terminal facilities * * * used or necessary in the transportation of persons or property". As such they are clearly as within the definition of the term "railroad", as are loading and unloading pens, which are nowhere specifically mentioned, but are similarly included within the definition because constituting terminal facilities.

The Commission itself has said that the purpose of the definition of "railroad" was to make it impossible for common carriers to escape their obligations to shippers or avoid the jurisdiction of the Commission on the ground that facilities embraced within the definition were furnished by a non-carrier agency. *Enterprise Transportation Co.* v. *Penn. R. R. Co.*, 12 I. C. C. 326, 335-336; *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I. C. C. 539, 545-547; *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 729.

Elevator operators perform a transportation service, as defined in the Act, through the "receipt, delivery, elevation and transfer in transit" of grain through the use of an elevator, which is a "terminal facility" used in such transportation, and embraced within the definition of "railroad." This service they perform and have performed for many years as the agents for the railroads, which pay them therefor on a basis of so much per 100 pounds. These allowances are subject to the jurisdiction of the Commission whenever such elevator operators are also shippers and

owners of the grain passing through their elevators. It has never been held that they were common carriers, and if a railroad should employ an elevator operator—who is not a grain dealer—to perform this service, there is nothing in the Act requiring that the charges exacted by him from the railroad company—which, as in the case of a public stockyard, are not paid by the shipper—become subject to the jurisdiction of the Commission any more than any other expense incurred by the carrier in the conduct of its business and which must be paid somehow out of the rate. The Commission itself has held that such an elevator operator is not a common carrier, and that it has no jurisdiction over his charges. *Keystone Elevator & Warehouse Co.* v. *Director General*, 73 I. C. C. 273, 274.

The decisions cited are determinative of the question at issue. The views of the majority are directly contrary thereto and those of the minority in harmony therewith.

4. The interpretation placed upon the Act by the dissenting Commissioners is fully supported by the legislative history of the statutory definitions upon which the majority relies.

The enlarged definitions of the terms "transportation" and "railroad," now contained in Section 1(3) and the provision [Section 15(13)] giving the Commission the power to regulate the compensation paid to "the owner of property transported," for the performance of services, or the furnishing of facilities, employed in the transportation of such property came into the Act in 1906. Together they had a common purpose, which was two-fold:

(1) To remove all doubt as to the duty of the railroads to perform the auxiliary or accessoral services embraced

in the definition of "transportation", such, for example, as refrigeration, and to subject the charges therefor, *whenever a separate charge was to be made to cover such service,* to the jurisdiction of the Commission by requiring the railroad itself to publish and file such charge with the Commission, whether performing the service itself or through an agent;[4]

(2) To prevent indirect rebating or undue preferences through payments of excessive allowances to shippers, whether to a private car line owner, who may also be a shipper, to an elevator owner transferring grain in transit, but who is customarily also a shipper of grain, or to a manufacturer or other shipper owning or furnishing any of the facilities embraced within the definition of a railroad, or who provides any of the facilities or performs any of the services embraced within the definition of "transportation", by subjecting such allowances to the control of the Commission.

That such were the purposes of the amendments is disclosed by their legislative history. They originated in recommendations made in the Commission's Annual Reports of 1904 and 1905. In these reports the Commission directed attention to abuses resulting from the system of private rebates, preferences and discriminations, and the practice of imposing additional charges upon shippers for incidental services furnished by non-carriers, especially through the

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[4]Had it been the intent of the Act to make such agent a common carrier, the Congress seemingly would have required such charges to be filed by the agent performing the service and not by the railroad company, since by Sec. 6 it is the carrier furnishing the service to the shipper which must file the charges assessed against him.

furnishing of private cars and the performance of refrigeration and icing service. In its Eighteenth Annual Report (1904) the Commission pointed out that the situation could be remedied in one of two ways: Either by requiring the railroad itself to perform such service and to subject *its* charges therefor to the jurisdiction of the Commission, whether performed by it directly or through an agent, or by subjecting the *agent itself* and its charges to the Commission's jurisdiction.[5]

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[5]The Commission said that the desired result could be accomplished by either one of two methods (pp. 17-19) thus described:

"1. By making the common carriers responsible to the public in the matter of this special equipment and this refrigeration service, if they are not now responsible.

"2. By bringing the car-line companies which provide this refrigeration for interstate shipments under the jurisdiction of the act to regulate commerce, and making their charges subject to the determination of this Commission.

"Under the first method the following points should be embraced:

"1. That the railway shall in all cases furnish the car needed for the movement of the traffic which it transports. This does not mean that the railway shall of necessity own the equipment itself, but that if it secures that equipment by lease it shall do so under conditions that the car, when provided, shall be its car. No railway should be permitted to transport the private cars of private individuals when it thereby works a discrimination against other shippers to whom it does not furnish similar cars.

"2. That the railway shall furnish refrigeration when needed. This imposes no hardship upon that company. * * * If the railway prefers to discharge this duty by contract with some private individual or corporation, it should, nevertheless, stand responsible to the public for the service rendered, to the end that

The Commission's renewal of these recommendations in its Nineteenth Annual Report (1905) was accompanied by

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it shall be performed with equality to all shippers at reasonable rates.

"3. That the railway shall publish its charges for refrigeration and maintain those charges exactly as its transportation charges are published and maintained. That the charges as so published shall be subject to the jurisdiction of the Interstate Commerce Commission, which, when it finds the charges to be unreasonable, may determine what charges are reasonable.

"4. Whenever the owner of the car is also the owner of the property transported, the compensation which the railroad company pays for the use of that car shall be subject to the jurisdiction of the Commission; and when the Commission has determined what is a reasonable compensation, no more shall be paid.

"The second method would require legislation of the following import:

"1. That all persons or companies furnishing refrigerator cars and refrigeration for interstate transportation shall be subject to the act to regulate commerce.

"2. That all refrigeration charges made by such persons or companies shall be published and adhered to, as is now provided for the publication of railway transportation charges.

"3. That the charges so made shall be subject to the control of the Interstate Commerce Commission, which shall have power to determine whether such charges are reasonable, and if found unreasonable, to prescribe the amount which shall be charged.

"4. When the owner of the commodity is also the owner of the car, the compensation for the use of the car shall be subject to the jurisdiction of the Commission."

It is readily observable that the method adopted by Congress conforms in detail as well as in principle to the first of the suggested methods and is wholly at variance with the second.

the submission of a proposed bill, in which the first and not the second of the two alternatives was followed. This bill became the foundation of the amendments referred to above.

In reporting the amendments now under review the House Committee (House Report No. 591, 59th Congress, First Session, submitted January 27, 1906) in explaining the purpose of expanding the definitions in Sec. 1 and adding the new paragraph proposed to Sec. 15 (now par. 13 set forth above), among other things stated:

> "The Act known as the Elkins Act of 1903 gave additional strength to previous legislation through its more specific prohibition relating to rebates, discriminations and preferences. Yet the ingenuity of some of the carriers and shippers had resulted in voiding the provisions of that Act through the use of joint tariffs, involving, in some instances, the railroad and a mere switch owned by a shipper, through arrangements whereby exclusive mileage was given to the shipper of products who owned his cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service independent to the shipment, as the furnishing of ice in the bunkers of the cars; by what is known as the 'midnight tariff', * * * (pp. 2-3).
>
> "The first section of the Bill is substantially Section 1 of the Act of 1887, with an enlargement of the definition of the word 'railroad' and the word 'transportation'. By this enlargement it is believed, that the 'devices' resorted to by carriers, through the use of switches and cars owned by shippers and by the use of refrigerator cars, and so forth, can be obviated" (pp. 3-4).

> "* * * This section [Section 4 of the Bill, amending Section 15 of the Act] further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. It is believed that under this provision those exclusive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled" (p. 5).

The Senate Report (No. 1242, 59th Congress, 1st Session), favorably reporting on the bill, clearly indicates the same purpose.

The legislative history of these amendments is thus wholly at variance with the contention of the majority that a public stockyard becomes a common carrier if it loads and unloads livestock as agent for the railroad company, as a service performed for the carrier and not for the shipper, and for which no charge against the shipper is imposed, merely because the services so performed are within the definition of "transportation", but is wholly in keeping with the contrary view of the minority opinions hereinbefore set forth.

We think the majority opinion of the Commission is equally at variance with other provisions of the Act.

Sec. 1(3) also provides:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons,

natural or artificial, engaged in such transportation as aforesaid *as common carriers for hire.*"

The italicized words clearly exclude the idea that a person, not a carrier, becomes one by the performance, as the railroad's agent, of some part of the railroad's transportation duties.

Moreover, these words were added to the Act by the Transportation Act of 1920, which codified and reenacted the Act as it then existed, making certain changes therein, some of substance and others of form and arrangement. In reporting on the Transportation Act, by which this change was made, the House Committee on interstate and foreign commerce (House Report No. 456, 66th Congress, 1st Session, submitted November 10, 1919, accompanying H. R. 10453) said:

> "Section 400 amends the first five paragraphs of section 1 of the commerce act, making minor corrections and clarifying the language in several respects, but makes no important change in policy." (p. 27)

This statement that no important change in the policy of the law was intended was made after the decision in *Ellis* v. *Interstate Commerce Commission, supra,* and consequently must be read in the light of the judicial interpretation theretofore placed upon the Act. *Manhattan Properties Inc.* v. *Irving Trust Co.,* 291 U. S. 320. Furthermore, the subsequent case, *United States* v. *Interstate Commerce Commission, supra,* arose after the Transportation Act and under its provisions. In that case the Court again held that an agent performing services for a railroad subject to the Act did not itself become a common carrier. It is also

significant that in amending Sec. 1(3) Congress did not include stockyard companies in the definition of "common carrier." That would have been the normal method of extending the jurisdiction of the Commission to include such companies had Congress intended to do so.

As this Court said in *Manhattan Properties Inc.* v. *Irving Trust Co., supra,* (p. 336) after pointing out that Congress had amended an act without disturbing certain provisions thereof which had previously been judicially construed:

> "This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. * * *
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> "In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' * * * If the rule is to be changed Congress should so declare."

Recent Congressional enactments also support our contention that Congress never intended to place under the jurisdiction of the Commission companies not actually common carriers but which merely performed for the railroads services within the statutory definition of "transportation". Section 261 of the Carriers Taxing Act of 1937 provides, in part:

> "As used in this subchapter—
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> "(a) The term 'employer' means any carrier (as defined in subsection (1) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual

operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *.

* * * * * * * *

"(i) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to sections 1 to 27 of Title 49."

This statute indicates quite clearly that Congress did not think that companies engaged in performing services embraced within the statutory definition of "transportation" and "carrier[s] by railroad", even though they might be controlled by or affiliated with a carrier by railroad.

The Railroad Retirement Act of 1937 (45 U. S. C. A., 1938 supp., sec. 228a) makes the same distinction between a carrier by railroad and a company performing incidental transportation services.

5. The far-reaching effect of the Commission's decision makes it plain that Congress did not intend to make persons performing services defined as transportation, as agents of a carrier, themselves common carriers.

(*a*) *As evidenced by the great variety of situations and persons affected.*

Notwithstanding the Commission's disavowal of any such intention, the logic of its reasoning would lead inescapably to the conclusion that the many persons and companies who perform transportation services for the railroads are common carriers by railroad subject to the Interstate Commerce Act. Among these services are icing of

cars (237 U. S. 434); pre-cooling of refrigerator cars for loading (232 U. S. 199); pick-up and delivery service (197 I. C. C. 675); transfer service by motor or horse-drawn vehicles (91 I. C. C. 539, 140 I. C. C. 685); wharfage service (59 I. C. C. 488, 100 I. C. C. 159, 123 I. C. C. 685, 157 I. C. C. 663); loading and unloading at terminals (59 I. C. C. 488); compression of cotton (17 I. C. C. 98); elevation of grain (34 I. C. C. 442, 73 I. C. C. 273); storage (59 I. C. C. 488, 190 I. C. C. 209); lighterage and car floatage (17 I. C. C. 40, 203 I. C. C. 481, 231 U. S. 274); unloading at shipside (23 I. C. C. 417); furnishing of privately owned cars (50 I. C. C. 652, 237 U. S. 434); drayage (100 I. C. C. 159, 123 I. C. C. 685, 177 I. C. C. 209); barge service (177 I. C. C. 209)—all of which services are held out to the shipper by the railroads in their tariffs and come within the definition of transportation in Section 1 (3) of the Interstate Commerce Act.

Congress clearly did not intend that all persons performing the services involved in these cases and others should by their performance become common carriers. Yet, under the Act, the status of any such person performing such service is the same, and no provision is made whereby some may be directly subjected to the jurisdiction of the Commission by being declared to be common carriers and others not. Had Congress intended that some should and that others should not, it would obviously have used language by which the status of each could be distinguished. It certainly could not have intended—and, as settled by the prior decisions of this Court, did not provide—that all persons performing such service should be common carriers. It therefore follows that none is made such by their performance.

That Congress did not intend that every person who performs service for the railroads should be subject to regulation by the Commission is further clearly indicated by the limited application of Section 15(13) of the Act to allowances paid to "the owner of property transported," as we have previously shown.

(b) By reason of the subjection not only of public stockyards companies but of many other persons to the accounting and security provisions of the Act.

Section 20 of the Interstate Commerce Act makes it the duty of the Commission to prescribe the forms of "all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act" and makes it unlawful for such carriers to "keep any other accounts, records or memoranda than those prescribed or approved by the Commission." In *Inter-State Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194, the Court upheld the power of the Commission to prescribe such accounts in connection with all of the business of any corporation subject to its jurisdiction, because it was, among other things, a common carrier subject to the provisions of the Act.

Section 20a forbids the issuance of securities by "a common carrier by railroad" which is subject to the Act.

If a public stockyard, loading and unloading livestock for a railroad company as its agent, and other persons performing services within the definition of transportation, thereby become common carriers, they become of necessity subject to these accounting and security provisions. No exception is made in their behalf. Obviously, Congress did not intend that every village drayman performing transfer service between railroad stations should be required to keep

his books in accordance with the accounting rules of the Commission or compelled to apply to it for authority to place a mortgage on his home.

It must be remembered that by the Transportation Act the Interstate Commerce Act—which had been many times theretofore amended—was reviewed, codified, its various provisions correlated and as such reenacted. We think it is plain that had Congress intended by the definitions in Section 1 to make stockyard companies and other persons performing transportation services common carriers, whether the remainder of their business consisted of the operation of a stockyard, a warehouse, the leasing of private cars or the conduct of a manufacturing business, it would have excluded such persons at least from these sections of the Act. The Act, therefore, discloses a consistent purpose, *viz.*, to bring within the jurisdiction of the Commission all persons who are common carriers in fact within the ordinary meaning of the term, to define with clarity the transportation duties to be performed by such carrier, to require all charges that such carrier itself makes to the public be filed with the Commission and hence subject to its jurisdiction, whether performed by the carrier itself or by an agent, and to prevent indirect rebates by bringing all allowances made by the carrier to a shipper for any transportation services furnished by him (but only when such service is connected with the transportation of his own property) subject to the jurisdiction of the Commission, but evinces no intention of broadening the term "common carrier" beyond its ordinary meaning so as to include within it all persons performing transportation services for a carrier as its agent.

6. A public stockyard loading and unloading livestock for railroads, as their agent, does not become a common carrier by reason of Section 15(5) of the Act.

At numerous places in its report the Commission stresses Section 15(5), reading as follows:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

We have never understood the supposed significance of this Section to the question at issue. Its objects are plain, to wit, (1) to impose upon the railroad the duty to load and unload livestock at public stockyards, and (2) to prohibit the railroad from making a separate charge for such service.

In this connection it should be borne in mind that carload freight, in this country, is customarily loaded and unloaded by the shipper at his expense, and is neither included in the line haul rate nor within the duties required to be performed by the carrier. It was doubtless in recognition of this practice that Congress provided in the last sentence of this section that nothing therein should be construed to affect the duties or liabilities of the carrier in respect of

transportation of other than ordinary livestock or its obligations with respect to livestock at points other than public stockyards. See *Atchison Ry. Co.* v. *United States*, 295 U. S. 193, 198-199.

The duty thus imposed upon the carrier to load and unload ordinary livestock at public stockyards, like any other transportation duty imposed upon it by this or any other section of the Act, may be performed by the carrier itself or through an agent. If it acts through an agent, such agent does not become a common carrier although, if the railroad made a separate charge for such service, the Commission would acquire jurisdiction over such charges through the railroad. *Ellis* v. *Interstate Commerce Commission, supra.* No separate charge is imposed upon the shipper for the loading and unloading of livestock at public stockyards and under this Section none may be. The Section is wholly without significance as bearing upon the question as to whether or not a public stockyard performing such service is a common carrier.

The foregoing interpretation of this Section is borne out by its stated purpose, as declared by Senator Cummins in submitting the bill to the Senate. The Senator, co-author of the bill and Chairman of the Committee which reported it, said:

> "The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a livestock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a

series of charges for various services performed in connection with the transportation of the live-stock, so that the shipper does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

"I am entirely in sympathy with the purpose of these shippers and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission and *compel the carriers to state in the published tariffs* the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to *use the railroads* in the shipment especially of live-stock." (Cong. Rec. Vol. 59, p. 674.) (Italics ours.)

In *Allied Packers* v. *Atchison Ry. Co.*, 161 I. C. C. 641, the Commission had occasion to state the purpose of Section 15(5), and said (p. 646):

"The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. *The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges* on shipments of live stock to and from public stockyards. * * * The sense of the paragraph is that the services named shall be performed *at the carriers' expense without additional charge to the shipper.*" (Italics ours)

There is not the slightest indication in the text of the amendment, nor in its legislative history, that it was intended thereby to subject the charges of a public stockyards for loading and unloading service, when performed for the carrier and as its agent, to the jurisdiction of the Commission. If such had been its purpose, it would seem that Congress would have amended the definition of "common carrier" so as to include public stockyards, as it had done in respect of express companies and sleeping car companies, or would have added to Sec. 15(5) itself a clause requiring that the charges of a public stockyards performing this service for the railroads should be filed with the Commission and made subject to its jurisdiction. The purpose of the amendment was not to protect the carrier against exorbitant charges by a public stockyards, but to protect the shipper against the imposition of a separate charge by the railroads.

In passing, it may be pointed out that the duty to perform this service without the making of any separate charge therefor is the same as that which—without statutory requirement—the carriers have always observed in connection with the handling of less than carload freight loaded and unloaded at the carrier's expense. Ordinarily this loading and unloading service is performed by the carrier's own employees. But when a carrier sees fit to employ a stevedoring company to perform it, or a warehouseman both to perform the service and provide freight-house facilities, such stevedoring concern or warehouseman is clearly not a common carrier, and the charges to the railroad for the service thus performed are not required to be filed with the Commission and the Commission has no jurisdiction whatever of the payments made for such service. The ex-

pense involved might, and logically should, have an effect upon the single charge made to the shipper for receipt, loading, carrying, unloading and delivery of less than carload freight, but the Act does not confer jurisdiction over the Commission to regulate such expenses any more than it confers jurisdiction to regulate other expenses of the carrier.

A recent case in which the effect of this Section was judicially discussed is *Cincinnati Union Stock Yard Co.* v. *New York Central R. R. Co.*, 56 Oh. App. 269, 10 N. E. (2d) 456. Issues in that case were substantially similar to those in the instant case and the opinion covers many of the points already discussed.[6]

In that case, the stockyard company had sued defendant to recover increased charges for loading and unloading livestock. The trial court rendered judgment for the plaintiff. In its opinion affirming the lower court, the Court of Appeals of Ohio adopted as its own "the reasoning and analysis of the law enunciated in that opinion [the opinion of the trial judge] together with his conclusions."

In that case the trial court in its opinion thus stated the question presented:

> "The real question for the Court to determine is whether or not this Court has jurisdiction in a case involving the charges of the Cincinnati Union Stock Yard Company for loading and unloading services rendered to the defendant. The defendant claims that these charges are subject to the regulations of the Interstate Commerce Commission."

After quoting extensively from Section 1(1) and (3) of the Interstate Commerce Act, the trial judge continued:

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[6]A certified copy of this unreported opinion is reproduced in Appendix B hereto, and has been filed with the Court.

"It would appear from a reading of the above sections of the Interstate Commerce Act that it applies to common carriers engaged in performing transportation service. It would further appear that the controlling factor in deciding the Interstate Commerce Act's applicability is whether or not the person to be charged under the Interstate Commerce Act is engaged as a common carrier.

"The defendant contends that the loading and unloading of livestock from the decks of cars is an incident to common carrier transportation. Section 15(5) of the Interstate Commerce Act has considered this point."

After quoting the Section the trial judge said:

"This section has taken into consideration the question at issue in this case and places upon the railroad company or common carrier the responsibility of loading and unloading livestock. It does not designate that the common carrier must employ the services of any particular agency in the loading and unloading service but does place upon the common carrier the responsibility of seeing to it that this kind of service is done, and further places upon the carrier the duty of performing this service without extra charge to the shipper. The railroad companies are obliged, in many instances, to employ the services of persons, firms and corporations who have no connection whatever with the railroad except to perform a specific service for a consideration.

* * * * *

"The question of whether or not the Cincinnati Union Stock Yard Company is a common carrier has been before the Interstate Commerce Commission and the Courts. The case of *E. Kahn's Sons*

Company v. *B. & O. Railroad Company,* 192 I. C. C. 705, and the decision in the case under the style of *U. S. of Amer. ex rel.* v. *Interstate Com. Com.,* 73 Fed. (2d) 948, seem to prove conclusively that the Cincinnati Union Stock Yard Company is not a common carrier but as a matter of fact is a non-carrier corporation.

* * * * *

"The Court is unable to find any law preventing the railroad company or common carrier from engaging the services of whoever it may deem necessary to assist it in its duty as a common carrier."

An appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals was dismissed. (132 Oh. St. 552, 9 N. E. (2d) 366) The railroad company filed a petition for certiorari in this Court, but voluntarily withdrew it, and it was accordingly dismissed. (302 U. S. 770)

II

THERE ARE NO FACTS OR CIRCUMSTANCES WHICH DISTINGUISH THE APPELLANT FROM OTHER PERSONS OR CORPORATIONS PERFORMING TRANSPORTATION SERVICES, AS THE AGENT OF THE CARRIERS, BY REASON WHEREOF THE APPELLANT IS SUBJECT TO THE JURISDICTION OF THE COMMISSION, AND SUCH OTHERS ARE NOT.

It follows from the foregoing discussion that a public stockyard which loads and unloads livestock, as agent of the railroads, is not itself a common carrier, and that there is no provision in the Act which subjects the payments made to it by such railroads for such service to the jurisdiction of the Commission. Unless, therefore, there are circumstances

peculiar to the appellant which distinguish its status from that of public stockyards generally, the order should be set aside because based upon an erroneous conception of the Commission's powers and duties. There are, however, no such circumstances peculiar to appellant as distinguished from other stockyards or other persons performing transportation services. Nevertheless, the majority of the Commission continues to point to the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, decided in 1912 on a factual basis which has since disappeared. The majority says that the appellant's charter originally authorized it to operate a railroad (although the majority of the Commission admits, and the District Court found, R. 118, that it does not do so now), and further calls attention to the fact that appellant has a reversionary interest in a railroad not now operated by it but leased and operated by a subsidiary of the New York Central. (R. 28-42) The minority finds nothing in these circumstances to distinguish appellant from any other public stockyard, or from any other person performing services within the definition of "transportation", as an agent of the carrier. (R. 43, 46-49, 57)

1. The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists.

The case was instituted by the United States at the request of the Interstate Commerce Commission to enjoin the appellant, the Junction, and the New Jersey Company (which held all or practically all of the stock of the first

two companies) from paying a bonus to a shipper for the purpose of assisting it in maintaining a packing plant at the yards, and also to compel the filing of tariffs and reports with the Commission.[1]

In its decision the Court looked behind the corporate entities of appellant and the Junction and treated them as a single enterprise because of their common control, and then reached its conclusion from a consideration of their collective activities. The decision of the Court shows clearly that what we have just stated is correct. It said (pp. 304-305):

> "*Together, these companies* [*i.e.*, the Junction and appellant], as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when *they* take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered *by the two companies,* and complete its delivery to the consignee. *They* are common carriers because *they* are made such by the terms of their charters, hold *themselves* out as such *and* con-

[1]At that time the Junction was operating the railroad owned by the appellant as well as other railroad properties, and was performing a terminal service within the City of Chicago. It had never recognized the jurisdiction of the Commission by filing tariffs therewith or otherwise, claiming that since it was only a switching carrier whose operations were confined wholly within a single state, it was not engaged in interstate commerce. (Brief for Appellant, 226 U. S. at 290)

stantly act in that capacity, and because *they* are so treated by the great railroad systems which use *them.*" (Italics ours.)

Again, speaking of the two companies collectively, the Court said (p. 306):

> "We think that *these companies,* because of the character of the service rendered by *them, their* joint operation and division of profits and *their* common ownership by a holding company, are to be deemed *a* railroad within the terms of the act of Congress to regulate commerce, and the services which *they* perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, *for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership, with its consequent control.*" (Italics ours.)

It will be observed that the Court's only reference to the Stockyard Company alone is in the last sentence of the foregoing excerpt, thus emphasizing the importance attached by it to the collective operations of these companies and to the Stockyard Company's participation in the profits arising therefrom. It is, we think, plain that the decision was based primarily upon the joint operation under common ownership of the Junction and the Stockyard Company and the consequent affiliation of the latter with a railroad en-

gaged in interstate commerce. In this the case is very similar to the earlier case of *Interstate Commerce Commission* v. *Southern Pacific Terminal Company*, 219 U. S. 498, in which the Court held that the terminal company, although lacking the customary indicia of a common carrier, because of its affiliation with an interstate transportation system of which it formed a part, could not grant a concession to a shipper.

The conditions which obtained in 1912, when the *Union Stock Yard* case was decided, no longer exist. The Junction in 1922, with the approval and authorization of the Commission (*Chicago Junction Case*, 71 I. C. C. 631, 150 I. C. C. 32), leased all its railroad properties, (including its leasehold interest in the railroad properties leased to it by appellant in 1913) to the River Road, a separately operated but wholly controlled subsidiary of the New York Central. (R. 32, 607, 631) Upon the execution of that lease the Junction cancelled its tariffs and ceased operation. (R. 32, 239, 298, 423)

The legal effect of these changes is well stated in two of the minority opinions.

Mr. Commissioner Eastman said:

> "The Yard Company, in my judgment, is not now a common carrier by railroad. Past decisions of the Supreme Court that it was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central." (R. 43)

In his opinion Mr. Commissioner Porter said:

> "In *United States* v. *Union Stock Yard*, 226 U. S. 286, the Supreme Court held that the Yard

Company was then a common carrier subject to the Act. * * * At that time the Chicago Junction Railway was the operator as lessee of the railroad properties owned by the Yard Company. The Yard Company as a separate corporate entity was not engaged as a common carrier by railroad, but it was so closely affiliated with the railroad through ownership of the stock of both by the holding company that all three were deemed by the Supreme Court to be practically one concern. * * * Since that decision material changes have taken place. * * *

"*So that* [*i.e.*, by the lease of 1922] *the connection between the Yard Company and the operator of the railroad has been severed.* It is true the Yard Company is still affiliated with the corporation, the Chicago Junction Railway Company, *but the latter is no longer the operator of the railway.* It now occupies merely the status of a non-operating lessor company. At this time there is no affiliation through stock ownership between the Yard Company and the operator of the railroad. It can not now be said that the Yard Company and the railway operator are practically departments of the same concern. * * * The Supreme Court could not now say, as it did in the 226 U. S. 286, that 'these companies'—referring to the Yard Company and the Chicago Junction Railway Company—'because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act.' *In referring to the 'service rendered' by the two companies the Court obviously did not have in mind merely the loading and unloading service. It had in mind the service pre-*

viously referred to in the opinion, namely, both the loading and transporting, the Court having previously said that the Yard Company and the Chicago Junction Railway, together, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the Act and perform services as a railroad when they take the freight delivered to the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce.

"It seems obvious from the opinion that the Court could not find the Yard Company to be a 'common carrier by railroad' by reference to its service, status, and activities considered separately and apart from those of the railroad." (Italics ours.) (R. 46-48)

It is elementary that the application of a statute depends upon facts existing at a given time, not upon facts that may formerly have existed. Consequently, since the prior decision of this Court was based upon the affiliation of the appellant and the operator of a railroad, it is no longer controlling, because its factual foundation no longer exists. See *Glens Falls Co.* v. *Delaware & Hudson Co.,* 55 Fed. (2d) 971, 980; 66 Fed. (2d) 490, 491 (C. C. A. 2nd).

2. The fact that appellant is authorized by its charter to operate a railroad—a fact noted by the Court in its prior opinion and referred to in the majority opinion of the Commission—does not constitute it a common carrier as is evidenced by subsequent decisions of this Court.

Among the factors, other than those already discussed, referred to by the Court in its prior opinion, is the fact that "they" (meaning thereby both the Junction and the

Stockyard) are made common carriers "by the terms of their charters." It is obvious from the opinion that this language must be read in connection with the context and the remainder of the opinion, and that the Court did not intend to hold that, lacking the other facts then present, the Stockyard Company was a common carrier and as such subject to the jurisdiction of the Commission by reason of the fact that its charter authorized it to operate a railroad. We say this with confidence because of subsequent decisions of this Court holding that whether a corporation is a common carrier or not depends upon what it does—not upon its charter powers.

In the language of the Commission itself, this Court, in *Colorado* v. *United States*, 271 U. S. 153, held:

> "The application of the act and the jurisdiction of the Commission cannot be limited or expanded by the provisions of a carrier's charter." *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 195.

The application of the Interstate Commerce Act is limited to companies actually operating a railroad. The significant thing is what the company *does* and not what its charter derived from some state permits it to do.

In *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 253-254, Mr. Justice Holmes, speaking for this Court, said:

> "The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does busi-

ness in the District, and *the important thing is what it does, not what its charter says.*" (Italics ours.)

In *United States* v. *Brooklyn Terminal*, 249 U. S. 296, this Court said, at page 304:

> "We need not undertake a definition of the term 'common carrier' for all purposes. *Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers.* We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad', made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, *nor upon whether the State of incorporation considers it such; but upon what it does. Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254." (Italics ours.)

In one of the latest cases dealing with the subject, *United States* v. *California*, 297 U. S. 175, 181, this Court stated:

> "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304."

While appellant's charter authorizes it to operate a railroad, it does not now do so. (R. 240) The District Court so found. (R. 118)

Among the charter powers of appellant is that of eminent domain, which is referred to in the majority report of the Commission. (R. 27) This power is at most a circumstance which may be noticed in determining whether a corporation actually engaged in transporting persons or property is a common or private carrier, but this circumstance does not determine whether or not it is *in fact* a carrier. *Tap Line Cases,* 234 U. S. 1, 26; *State* v. *Public Service Commission,* 117 Wash. 453, 201 Pac. 765, 767; 51 *Corpus Juris* 5-6.

The possession of this power which appellant has covenanted to exercise only if the River Road is unable to condemn land itself (R. 667) has, under the existing circumstances, of course, no tendency to show that appellant is a common carrier by railroad. As a practical matter, the River Road could not invoke the covenant because it is an Illinois railroad corporation (R. 738A-739) and has ample power under Illinois law to condemn any property it may need. (Smith-Hurd's Ill. Rev. Stat., 1937, c. 114, sec. 18, and c. 47, sec. 2.)

The power to condemn land for public use is a privilege which the state is free to give or withhold, and it may be granted to a corporation organized to construct a railroad even though it has never operated and does not intend to operate. *Elliott on Railroads* (3rd Ed.), secs. 1185, 1186, 1194, 1195; *St. Louis Connecting R. R. Co.* v. *Blumberg,* 325 Ill. 387, 394-395, 156 N. E. 298. In Illinois such power is given to union depot companies which merely provide tracks and facilities for use by common carriers by railroad. (Smith-Hurd's Ill. Rev. Stat. 1937, c. 114, secs. 175, 178, 180.)

The covenant in the 1922 lease expressly provides that if appellant acquires additional lands by condemnation at the request of the River Road it shall convey or otherwise deliver them to the River Road. (R. 667) This negatives any intention on the part of appellant to operate any properties so acquired. *Moreover, appellant could not operate them without first obtaining a certificate of public convenience and necessity from the Commission under Section 1 (18) of the Interstate Commerce Act.*

The Junction in 1922, with the specific authorization and approval of the Commission, leased its railroad properties and those previously granted, demised and leased to it by appellant, to the River Road, a subsidiary of the New York Central. (R. 32, 607, 630, 651, 653) Appellant was a party to the lease—but was not a lessor as indicated by the Commission (R. 27)—and consented to and ratified it. (R. 677) The properties were thus leased to the River Road in the manner provided by law. Neither the lease nor the order of the Commission imposed any responsibility upon appellant for the operation of that part of the properties which appellant in 1913 had demised to the Junction in perpetuity. All the properties covered by the 1922 lease were demised to the River Road "with the right, power and authority in the River Company * * * thereon to pursue the business of a common carrier." (R. 656) In Article III the River Road was given "the right to conduct, operate and manage * * * the premises and properties by this instrument demised." (R. 660) In the same article the River Road agreed to assume and perform all legal obligations affecting or relating to the properties imposed by law on either the Junction or appellant. (R. 664)

Thus the 1922 lease, approved and authorized by the Commission, expressly contemplated the operation of the properties by the River Road as a common carrier and the performance by it of the legal obligations affecting or relating to the properties. The River Road and trunk lines which use the properties under trackage rights are the companies which are engaged in common carriage and required to file tariffs.

In *Houston Ry. Co.* v. *Anderson*, 120 Tex. 200, 36 S. W. (2d) 983, the plaintiff sought to hold a lessor railroad company responsible for mental anguish caused by the lessee company's conductor. The lessor's line had been leased pursuant to an order of the Interstate Commerce Commission, but neither the lease nor the Commission's order specifically provided for the exemption of the lessor from responsibility for the further operation of its road. The Court held that Congress had power to exempt the lessor of an interstate railroad from responsibility for performance of its obligations under a charter issued by a state, and had lawfully delegated this authority to the Commission in Section 5 of the Interstate Commerce Act. At the conclusion of its opinion the Court said (36 S. W. (2d) 984):

> "* * * where the Interstate Commerce Commission, in the exercise of the powers confided to it, has specifically authorized the owner company to lease its railroad to a particular lessee for the purposes of operation, and there is no language in the order or the lease implying a reservation of the former company's liability, the presumption should be indulged that transfer of responsibility for the performance of the charter obligations respecting matters of operation was intended by all parties con-

> cerned. * * * The very fact that the Commission approved the lease in question here strongly implies the consent of the Commission to the operation of the railroad by the Texas & New Orleans Railroad Company [lessee] upon that company's responsibility exclusively. Exemption of the plaintiff in error [lessor] from liability in matters pertaining to operation of the road sufficiently appears."

The suggestion that appellant as a lessor company is still a common carrier within contemplation of law is not in harmony either with the wording of the Act or its purpose. The question is not whether Congress has the power to regulate lessor companies to the same extent that it does operating companies, but whether Congress has in fact done so. *Cf. Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, 174, 177. This is determined by an examination of the Act. That statute shows that the only interest Congress has evinced as far as non-operating railroad companies are concerned is to require them to keep the Commission informed of their affairs by filing annual reports as provided in Section 20, and to require them to come to the Commission for authority when they want to issue securities (Sec. 20a).

3. The other factors referred to in the prior decision of this Court either no longer exist, or when disassociated from appellant's affiliation with a common carrier, are no longer of significance.

In addition to the foregoing, the Court in the prior case referred to the fact that "*they*" (meaning thereby the Junction and the Stockyard) "hold *themselves* out" as com-

mon carriers, "are so treated by the great railroad systems which use *them*", to "the character of the service rendered *by them*," and to the fact that "the services which *they* perform are included in the definition of transportation as defined in that Act." We think it is obvious—as pointed out by Mr. Commissioner Porter—that in these observations the Court was referring to the collective activities of the two companies through "their joint operation and division of profits, and their common ownership by a holding company." (R. 46-48) This is borne out by the only statement which the opinion contains in respect of the Stock Yard Company itself, in respect of which the Court said:

> "In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company [*i.e.*, the 1897 lease], for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control." (226 U. S. at 306)

If, by referring to the fact that the services performed by the two companies collectively are within the definition of "transportation" as contained in the Act, the Court meant to hold—as we think it did not—that the Stock Yard Company became subject to the jurisdiction of the Commission by reason of the fact that it loaded and unloaded livestock as the agent of the carriers, then such conclusion is inconsistent with the subsequent decisions of this Court in *Ellis* v. *Interstate Commerce Commission, supra*, and *United States* v. *Interstate Commerce Commission, supra*, and may be deemed to have been overruled thereby.

In respect of the treatment accorded to appellant by the great railroad systems which avail themselves of its service, the record shows numerous different ways in which the railroads treat the appellant differently from the way in which they treat common carriers by railroad,[2] and

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[2]Witness Heinemann pointed out that appellant is treated differently from common carriers by railroad. While individually some of these acts may not seem important, collectively they show the railroads have in fact recognized that appellant is engaged in a calling which is entirely different from their own. Summarized, these differences are:

(a) The railroads have never entered into joint through rates with appellant, except in the instance of a single carrier, which rates never became effective because the Commission would not permit it. If appellant were a common carrier, it would be the duty of the railroads under Section 1(4) of the act to establish joint through rates with appellant. (R. 393)

(b) The railroads do not deliver possession of cars of livestock to appellant as they do in the case of connecting or switching carriers. The railroads, with their own engines and crews, move trains, both loaded and empty, to and from the platforms of appellant. These trains do not come upon the property of appellant, and it exercises no control over them. (R. 240, 249, 254-255, 292-293, 599)

(c) Appellant is a large purchaser of grain and hay, which is shipped to it by rail. It is not a party to the rates on these commodities, but pays the full rate and is treated in the same manner as any commercial receiver of freight. (R. 393) It is well known that in connection with company material practically all railroad companies, by purchasing the commodity for shipment to a destination on their line and rendering some service in connection with it, pay something less than the full freight rate through the medium of divisions of through rates. *Marquette Coal Co.* v. *Pennsylvania R. R. Co.*, 40 I. C. C. 4; *Tuckerton R. R. Co.* v. *Pennsylvania R. R. Co.*, 52 I. C. C. 319.

(d) Freight bills on consignments to appellant are rendered to it by the railroads and paid in the same manner which is followed in the case of an ordinary industry, in-

neither the Commission nor our opponents have been able to point out specifically a single way in which appellant is treated by the railroads as a common carrier. Whatever may have been the treatment accorded to the appellant and the Junction, when operated together as a single enterprise, the appellant since its divorce from the operator of a rail-

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stead of by handling on interline accounts as is customary between common carriers. (R. 393)

(e) Appellant is not a party to the per diem agreement between railroads; instead it is assessed demurrage on its shipments, and treated like any other large industry. (R. 393-394)

(f) Appellant is not a member of and has never been invited to become a member of any of the railroad associations. (R. 394)

(g) Appellant is not invited to conferences with carriers respecting rates, charges, rules or regulations affecting the transportation of livestock, although it has a very great interest in such matters. (R. 394-395)

(h) Appellant's employes are not given free transportation, as is customary between railroads. (R. 395)

(i) The railroads compute all freight and other transportation charges on livestock moving to and from appellant's yards. Appellant has become a collecting agent of the railroads for inbound charges, except on shipments consigned to the packers, merely because it is more convenient to the railroads for appellant to collect these charges in connection with its own charges than it is for the railroads to do that work themselves. The charges so collected are not handled on interline accounts, as is customary between railroads, and appellant is required to put up a bond to secure their payment, a thing unheard of in the ordinary relations between railroads. In collecting the charges due it from the railroads for loading and unloading services, appellant does not deduct them from moneys which it has collected for the railroads, but renders separate bills which are paid monthly. (R. 260, 287, 395, 404-405, 544-545)

(j) Appellant does not collect undercharges on freight shipments, nor does it handle or have anything to do with overcharge claims on such shipments. (R. 409)

road has not been treated by the railroads as a common carrier in any respect. Factual foundation for this circumstance, referred to by the Court, therefore no longer exists.

As in respect of its other observations, the Court's comment that *"they"* (*i.e.*, the Stockyard Company and the

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(k) While appellant furnishes information to the railroads concerning dead and crippled animals and also furnishes weights to the railroads, the latter have their own representative, the Western Weighing & Inspection Bureau, make investigations, keep records and hold post-mortem examinations of dead animals, keep a close watch on weights furnished, make their own classification of animals and otherwise in these respects conduct themselves toward the appellant just as they would in any other case where a non-carrier agent was performing certain services for them. The Central Inspection & Weighing Bureau renders similar but less extensive services for the railroads in connection with outbound shipments to the east. (R. 399-404, 409-410)

(l) Appellant and the railroads do not use the same classification of animals. For instance, the stockyard classification of calves is based on weight, while the classification of the railroads is based on age. Appellant has never been invited to conform its classifications to those of the railroads. (R. 396-397)

(m) Neither waybills nor shipping orders are ever prepared by appellant. This work is performed by the railroads directly or through the railroads' joint agency at the Union Stock Yards. (R. 397, 594)

(n) Appellant is not called upon to quote freight rates or to handle ordinary railroad traffic matters, to validate or arrange for drovers' return transportation or similar railroad matters. This work is done either by the railroads' joint agency or individual representatives of the railroads. (R. 408-409)

(o) Appellant is not a member of the Western Weighing & Inspection Bureau, the Central Inspection & Weighing Bureau, or the joint stockyard railroad agency, and has never been invited to become such a member. (R. 365, 397, 409-410)

Junction) "hold *themselves* out" as common carriers "*and* constantly act in that capacity," like the remainder of its observations, refers on its face to their collective activities. Unless any public stockyard or any other person performing services for a railroad company, as its agent, becomes a common carrier because of their performance, then the fact

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(p) Appellant is never asked to confer with the railroads on questions of policy, nor has it ever been invited, notwithstanding its interest in livestock rates, to become a member of any of the rate committees of the railroads. (R. 397-398).

(q) Appellant has its own accounting system, which is wholly independent of the railroads' accounting systems, and is not a subscriber to the accounting rules or practices of the railroads. (R. 398)

(r) Claims for injury to or loss of stock in transit are handled by the line-haul carriers and not by appellant, although appellant may be asked to furnish the trunk lines with such information as it may possess concerning the animals involved. (R. 398)

(s) Appellant is not a member of the freight claim association of the railroads nor a party to its rules. (R. 555)

(t) Appellant is not allowed a division of freight rates, and is not a party to any tariff arrangement on transit stock; instead, the railroads pay it for its services the charges which it has on file with the Secretary of Agriculture. (R. 405-406)

(u) Appellant issues no bills of lading, and its name is not shown by the railroads on bills of lading or waybills as a participating carrier. (R. 397, 408, 410)

(v) Appellant is not asked to participate in cases involving livestock or other rates. (R. 409)

(w) Appellant is not now, nor has it ever been, a participating carrier in any of the tariffs of the railroads. Sperry's tariff I. C. C. 329 (a tariff of the railroads serving Chicago) is a directory of industries in the Chicago district, and appellant is listed therein as an industry operating a stockyard. Sperry's tariff I. C. C. 339 (also a tariff of the railroads serving Chicago) contains the charges, rules and regulations on traffic to and from points within the Chicago district. In this tariff appellant's stockyard is listed as a station on

that the appellant holds itself out to perform and performs the service of loading and unloading livestock is wholly immaterial. It holds itself out to perform all of the services embraced within the definition of stockyard services in the Packers and Stockyards Act, including the "receiving * * * holding, delivery, shipment, * * * or handling in commerce of livestock" which, of course, includes the acts of unloading and loading. (R. 252, 283-286) In so doing it is engaged in a public calling but not as a common carrier. The majority report of the Commission stresses the fact that the appellant is engaged in a public calling and holds itself out to perform the services embraced in such public calling, as does every other

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the Junction Railway, operated by the River Road. The application of this tariff makes the Chicago rates apply to and from appellant's stockyard, subject in some instances to certain "plus" charges. Tariffs of line-haul carriers provide for through rates on livestock between appellant's stockyard and all points in the United States. In no tariff is appellant listed as a concurring carrier. In every case its stockyard is indicated directly or through cross reference as a point to and from which through shipments may be moved at the established rates by the railroads concurring in said tariffs. (R. 393, 397, 440 *et seq.*, 557-558, 731-732)

The protestant railroads sought to discount the value of this testimony by cross-examination designed to bring out the fact that many switching carriers do not issue bills of lading or prepare waybills on through shipments. (R. 552-555) No one can deny that a failure to perform these particular functions is not determinative of the common-carrier status of such companies. We do state, however, that there is an impressive showing in this record that the railroads do not treat appellant as a common carrier, and that, in so far as such treatment may be important in determining the status of appellant (see *Tap Line* cases, 234 U. S. 1, 26), the facts all negative the contention that it is a common carrier.

person engaged in such a calling. But the Act does not confer jurisdiction upon the Commission of all persons engaged in a public calling but only those engaged as common carriers.

The majority opinion of the Commission also emphasizes the fact that the appellant and the railroads serving its yard are compelled to employ its services and facilities for the loading and unloading of livestock. But the fact that one is engaged in a public calling and that all resorting to the use of its facilities must employ his or its services does not make all such persons common carriers. Elevator operators, warehousemen, wharfingers and others, as well as the owners of public stockyards, are engaged in a public calling, are required to serve all comers at reasonable rates and, like common carriers, are subject to public regulation, but they are not common carriers. The source of the power to regulate all is the same and the occasion for its exercise the same, but a public stockyards is no more a common carrier than is a warehouseman.

The other factors referred to in the prior opinion, enumerated above, have either ceased to exist, or, disassociated as they now are with any affiliation or joint operation with a common carrier, are without significance on the questions at issue.

4. Mere ownership of a reversionary interest in railroad facilities does not make a non-operating owner of such interest a common carrier by railroad.

The only interest that the appellant has in any railroad is a remote reversionary interest in part of the properties now operated by the River Road, a New York Central subsidiary. The majority of the Commission, although conceding that the appellant's previous affiliation with any

company operating the railroad no longer exists, relies in part upon the existence of this reversionary interest in support of its jurisdiction. (R. 39-40)

Just how remote this interest is is shown by the facts that the indenture of December 1, 1913 between appellant and the Junction is in perpetuity, that it contains no defeasance clause, and that under the Illinois decisions the demise of the property was equivalent to a conveyance of the fee. (R. 681-689) *Chicago, Burlington and Quincy R. R. Co.* v. *Boyd*, 118 Ill. 73, 75, 7 N. E. 487; *Wiggins Ferry Co.* v. *Ohio and Mississippi Ry. Co.*, 94 Ill. 83, 93; *Huck* v. *The Chicago and Alton R. R. Co.*, 86 Ill. 352, 354-355; see also *Central R. Co. of New Jersey* v. *United States*, 229 Fed. 501, 508, 509 (C. C. A. 3d), certiorari denied, 241 U. S. 658.

Mere *ownership* of railroad facilities, however, does not make the owner a common carrier by railroad.[3] In *Escanaba & Lake Superior R. R. Co.* v. *United States*, 303 U. S. 315, the question involved was whether or not the Escanaba railroad was a carrier whose consent was required to a pooling arrangement under Section 5(1) of

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[3]To this effect: *Escanaba & Lake Superior R. R. Co.* v. *United States*, 303 U. S. 315, 321; *Detroit International Bridge Co.* v. *Tax Board*, 294 U. S. 83; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 295-296; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 443-444; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 219; *Kentucky & I. Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. 567, 617-618; *Guaranty Status of Leavenworth Terminal Ry. & Bridge Co.*, 79 I. C. C. 824; *Keokuk & Hamilton Bridge Co.* v. *Wabash Ry. Co.*, 66 I. C. C. 545, 547-548; *Wharfage, Handling, and Storage Charges*, 59 I. C. C. 488; and *Enterprise Transportation Co.* v. *P. R. R. Co.*, 12 I. C. C. 326, 335-336.

the Interstate Commerce Act. The only interest that the Escanaba had in the traffic involved was that one of the parties to the pooling arrangement transported ore over its line under a trackage agreement. This Court said at page 321:

> "Escanaba is not a carrier of the ore which is hauled [over the rails of the Escanaba] between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; * * *."

The company which *operates* railroad facilities rather than the company which owns them is the common carrier. As already pointed out, it is what a company does—not what it may do at some future time—which determines whether it is a common carrier or not.

In *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, it was held that a corporation which owned and operated a railroad bridge across the Ohio River between Kentucky and Indiana was not engaged in interstate commerce. The Court said at pages 153 and 154:

> "That business [the operation of interstate trains over the bridge] was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

The regulatory provisions of the Interstate Commerce Act are directed to the operating company rather than the owner of the facilities. The Act was originally passed for the purpose of uprooting discrimination and to prevent

the railroads from exacting unreasonable charges. While these purposes have been expanded by amendments to the original Act, the principal interest of Congress at all times has been that the operating companies which deal directly with the public be subject to supervision and regulation. The only requirement imposed upon lessors or owners of railroads is that they file annual reports with the commission. The section of the Act which requires the filing of such reports (Sec. 20) is not only directed to common carriers subject to the Act, but also to "the owners of all railroads engaged in interstate commerce as defined in this Act." The fact that Congress found it necessary to refer separately to the "owners of all railroads" is a clear demonstration that mere ownership or the mere existence of a reversionary interest does not bring a company within the jurisdiction of the Commission except for the limited purpose of Sec. 20.

Thus, even if it can be said that appellant is still the owner of railroad tracks which were granted, demised and leased in perpetuity, such ownership would not make it a common carrier engaged in interstate commerce; for appellant would merely be furnishing "a highway for such carriage" by the River Road and the various trunk lines which use the properties. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 219.[4]

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[4]The Supreme Court of Wisconsin has also held that a lessor company is not a public utility under the laws of that state. In *Chippewa Power Co.* v. *Railroad Commission*, 188 Wis. 246, 205 N. W. 900, the Court held that the lessor of a public utility plant was not a public utility, saying (205 N. W. 902):

> "The plaintiff, while the owner of the property and of the plant, has parted with its possession of the same

III

THE SETTING ASIDE OF THE COMMISSION'S ORDER WILL NOT RESULT IN APPELLANT'S LOADING AND UNLOADING CHARGES BEING UNREGULATED. THE SECRETARY OF AGRICULTURE, UNDER THE PACKERS AND STOCKYARDS ACT, 1921, HAS FULL JURISDICTION.

Appellant is a public stockyard subject to regulation under the provisions of the Packers and Stockyards Act, 1921 (R. 241) and, like other public stockyards, it is under a duty to perform essential stockyard services, including the loading and unloading of livestock, for all persons who may request it so to do, up to the limits of its capacity. (Sec. 304; 7 U. S. C. sec. 205.) Nevertheless, the majority of the Commission expressed the view that the Secretary of Agriculture would not have jurisdiction over these charges "whether or not the same is reposed in the Commission." (R. 38)

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to the lessee, under the lease. As long as the lessee performs the covenants and conditions of the lease, it is, to all intents and purposes, the owner of such plant for a period of 30 years. * * * If the plaintiff, under the facts in this case, be deemed a public utility, then the definition of a public utility has been broadened to an extent heretofore undreamed of. An owner of an office building who leases the whole or a part thereof to a public utility would thereby be embraced within the definition of a public utility, and his lease would be subjected to regulation of the Railroad Commission. The owners of patented devices leased to telephone companies would also come within the definition of the term 'public utility,' and their leases, which are purely private contracts, would be subjected to regulation by the commission. * * * A line or distinction must definitely be drawn somewhere * * *."

The Commission's conclusion that the Secretary has no jurisdiction over such charges is not well founded. The Packers and Stockyards Act, the relevant sections of which are printed in an appendix hereto, is applicable to stockyard owners engaged in the rendition of stockyard services. (Secs. 304, 305; 7 U. S. C. secs. 205, 206) In Section 301 (b) of the Act stockyard services are defined as "services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling, * * * marketing, feeding, watering, *holding*, *delivery*, *shipment*, weighing, or *handling*, in commerce, of livestock." (7 U. S. C. sec. 201) Loading and unloading are essentially stockyard services, and fall within the broad term of this definition. (R. 283-286)

The Packers and Stockyards Act, however, further provides (Section 406(a)):

> "Nothing in this act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission." (7 U. S. C. sec. 226)

The Commission construes this provision as limiting the Secretary's jurisdiction to stockyard services other than loading and unloading in connection with rail-borne stock. (R. 40) Such an interpretation, however, does not follow from the language used; nor is it necessary in order to carry out the purposes of that portion of the Act.

It will be noted that Congress first uses language which, standing alone, gives the Secretary broad and comprehensive jurisdiction (Section 301(b)), and then takes away enough of this jurisdiction to preserve all of the existing

jurisdiction of the Commission and to prevent any interference with the functioning of the Commission that might result from the Secretary's having concurrent jurisdiction. (Section 406(a)) There is no intimation in the language that Congress intended in any way to enlarge the group of persons and corporations subject to the jurisdiction of the Commission.

If the Commission's interpretation of Section 406(a) is correct, either all stockyards performing loading and unloading services for the railroads are subject to the Interstate Commerce Act, in respect of these charges, or many of them will escape all regulation of their loading and unloading charges, because they operate no railroad facilities and have no affiliations with railroads. As we have pointed out, Congress has taken no steps to extend the jurisdiction of the Commission, and the latter result does not appear to be in harmony with the comprehensive regulation evidenced by the broad terms of the Packers and Stockyards Act.

Prior to 1920 the burden of showing that it was the railroads' duty by virtue of custom or practice to perform loading and unloading of livestock was on a complaining shipper. In that year, by the enactment of Section 15(5), Congress removed that burden and made it obligatory on trunk-line carriers to perform such services on interstate traffic at all public stockyards. *Atchison Ry. Co.* v. *United States*, 295 U. S. 193, 198-199.

The following year Congress enacted the Packers and Stockyards Act, which was designed to regulate the activities and services rendered in connection with livestock at public markets. No one can read the comprehensive language of this Act and the decision of this Court in *Stafford*

v. *Wallace*, 258 U. S. 495, upholding it and have any doubt that it was the intention of Congress that all services performed in connection with the handling of livestock at public stockyards should be subject to regulation.

We think a sounder interpretation of Section 406(a) would be that only enough is subtracted from the broad powers given the Secretary to enable the Commission to perform its functions under the Interstate Commerce Act.

It has already been pointed out in this brief that under the Congressional scheme the jurisdiction of the Commission must be exercised through control of companies which are in fact common carriers by railroad rather than by jurisdiction purely over subject matter. It follows then that the Secretary has jurisdiction over public stockyards which are not in fact "common carriers by railroad" in the rendition of loading and unloading service for the railroads. Under the Commission's interpretation, however, the loading and unloading services and charges of non-carrier stockyards would be wholly free from regulation. This would serve no conceivable purpose of Congress.

This reasoning is supported when we consider that the only possible purpose of the exception in the Packers and Stockyards Act was to preserve unimpaired the existing powers of the Commission. To give a specific illustration: Section 15(5) had been added to the Interstate Commerce Act the previous year, and undoubtedly Congress, in furtherance of its general purpose, wanted to prevent any assertion on the part of the railroads that the duty of railroads to load and unload livestock at public stockyards had been impliedly repealed by the subsequently enacted Packers and Stockyards Act. Since the purpose of Section 15(5) can be, and is, effectuated by con-

trol of the Commission over the line-haul carriers, the extension of the application of the Interstate Commerce Act to stockyards which are not common carriers was not necessary to carry out that purpose.

An harmonious construction is obtained by construing the Packers and Stockyards Act as giving the Secretary authority to regulate the charges for loading and unloading services performed by non-carrier stockyard companies which are employed by the railroads to perform this task for them. In the case of companies which are "common carriers by railroad" and also operate stockyards, such as the New York Central, which operates the Buffalo yards, and the Michigan Central, which operates the Detroit yards (R. 286, 377), Congress intended that there should be no divided jurisdiction, and it took no chance that any such carrier might escape the duties imposed by Section 15(5) by resort to the subsequently enacted Packers and Stockyards Act, 1921. As to other stockyards, a holding that the Secretary has jurisdiction over loading and unloading services furnished to, and paid for by, the railroads would in no way affect the power or jurisdiction of the Commission nor confer concurrent power upon the Secretary over any matter within the power or jurisdiction of the Commission. The provisions of Section 406(a) do not operate, therefore, to limit the jurisdiction of the Secretary over non-railroad stockyards conferred by other Sections of the Act.

This interpretation would avoid any of the so-called barter-and-trade methods of fixing loading and unloading charges referred to by the Commission. (R. 39) It would also avoid the unfounded fear of the majority of the Commission (R. 44) that the twenty-two trunk lines enter-

ing Chicago might be mulcted by appellant; for there is no presumption that one arm of the government will do any less justice to all concerned than another arm of the government.[1]

Although appellant was not permitted to make a comprehensive evidentiary showing that barter-and-trade methods of fixing loading and unloading charges have not in fact worked hardship on the railroads at various stockyards throughout the country where such methods obtain, the record does show that on Illinois intrastate shipments appellant's loading and unloading charges are not filed with the Illinois Commerce Commission but are nevertheless paid by the railroads without question. (R. 411-412) Under the Commission's construction of the Packers and Stockyards Act, 1921, appellant's loading and unloading charges on intrastate shipments would be subject to no regulation; whereas, under appellant's construction the Secretary of Agriculture would have jurisdiction of the charges on intrastate as well as interstate traffic under the doctrine of *Stafford* v. *Wallace*, 258 U. S. 495.

Commissioner Eastman, with his long and comprehensive experience in regulatory matters, said in his able dissenting opinion:

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[1]The railroads now pay to appellant charges filed by it with the Secretary of Agriculture for various services performed for them. On shipments stopped at appellant's yard by the railroads for rest, water and feeding pursuant to the Twenty-eight Hour Law (45 U. S. C. secs. 71-76) the railroads pay such charges for unloading, feeding, yardage and reloading. (R. 406-407) Appellant also furnishes and places additional bedding in livestock cars when requested by the railroads so to do, and they pay its charges for the material and service on file with the Secretary. (R. 407)

"It is by no means clear, however, even if the Yard Company is found not to be a carrier by railroad, that the charges which it makes against the railroads for the loading and unloading service will not be subject to public regulation. * * *

"Why is it that the Yard Company is in a position to insist upon loading and unloading the livestock for the railroads and therefore to enjoy a virtual monopoly of this employment? The answer to this question, I take it, lies in the fact that the Yard Company is a public stockyards and that the loading and unloading of the livestock is so intimately related to the proper conduct of that public business that it cannot well be divorced therefrom and placed under separate supervision. As I see it, therefore, although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.

"While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. *So far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextricable part of stockyards service.* It follows, therefore, that the charges made against

the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act.

"From an administrative standpoint, the division of duties which would result from this construction of the law would simplify matters, in comparison with the situation which will result from the decision of the majority. Under the latter decision, the Yard Company will be partly under the jurisdiction of this Commission and partly under the jurisdiction of the Secretary of Agriculture, involving much duplication of work. On the other hand, under the construction of the law which I believe to be sound, the Yard Company would be wholly under the jurisdiction of the Secretary of Agriculture." (Italics ours.) (R. 44-45)

There is no inconsistency between the conclusion reached by Mr. Commissioner Eastman as to the power of the Secretary of Agriculture to regulate the loading and unloading charges of non-carrier stockyards and the decision of this Court in the so-called *Hygrade* case, *Atchison Ry. Co.* v. *United States,* 295 U. S. 193, referred to by the majority of the Commission (R. 38-39), and the decision of this Court in *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470, on which the District Court to some extent relied. (R. 160)

The Commission in its report (R. 38-39) referred to the statements in the *Hygrade* case that the Interstate Commerce Act and the Packers and Stockyards Act "clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission," and that "The boundary is the place where transportation ends." (295 U. S. at 201) The ultimate question in that case was the

amount of charges a complaining consignee should be required to pay for the transportation of certain livestock consigned to it at appellant's stockyard. Having in mind that the *Hygrade* case involved the validity of an order of the Commission which could be effective only against common carriers by railroad, all this Court said, in the language on which the Commission relied, was that, so far as the shipper or consignee of the livestock is concerned, the boundary between the jurisdiction of the Commission and that of the Secretary is the place where transportation ends. The Court found it unnecessary to determine whether the Stockyard Company was a common carrier.

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 444, this Court said that "the only *relation* that is subject to the Commission is that between the railroads and the shippers." As Mr. Commissioner Eastman stated in the above excerpt from his dissenting opinion, the loading and unloading service, as between the railroad and the shipper, is a transportation service subject to the jurisdiction of the Commission, but, as between the railroad and the stockyard company, it is a stockyard service subject to the jurisdiction of the Secretary of Agriculture.

In *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 476-477, this Court upheld the action of the Secretary of Agriculture in excluding the loading and unloading facilities of the stockyard company from the rate base in a proceeding in which the Secretary had prescribed rates for certain stockyard services. As is shown on page 473 of the opinion, the charges assessed by the stockyard company for the loading and unloading service performed by it for the railroads were not covered by the order of the Secretary. Since the Secretary had entered no order fixing rates for this loading and unloading service it follows that

this Court correctly held that the loading and unloading facilities were properly excluded from the rate base. The Court was not called upon to determine whether the stockyard company was or was not a common carrier by a railroad, and in fact made no such determination. The statements of the Court in its opinion must be read in the light of the question before it.

The fear of the majority of the Commission that the railroads will be at the mercy of the appellant in respect of the amount of loading and unloading charges that they must pay is of course no reason for reading into the Interstate Commerce Act language which is not there; but, quite aside from the legal immateriality of the fear, the fact remains that it is unfounded, even if the Secretary of Agriculture does not have any jurisdiction over such charges. Section 2 of appellant's charter provides that for the care, subsistence and handling of livestock it "may take and require to be paid, such *reasonable* charges as may be deemed just and proper." (R. 646).

Moreover, appellant is a public utility standing at an important gateway of commerce (*Stafford* v. *Wallace*, 258 U. S. 495) and is under a common law duty to charge reasonable rates. In *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, the question before the Supreme Court was whether the State of Kentucky had power to prescribe rates for the use of an interstate bridge. In holding that Congress alone had power to regulate such charges, the Court said (p. 222):

> "We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the

> right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case."

It is well settled that one who provides facilities or service used by the public at gateways or on highways of interstate commerce may exact only a reasonable charge. See with respect to wharfage: *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; with respect to ferry service: *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 217; with respect to the use of highways: *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Interstate Transit, Inc.* v. *Lindsley*, 283 U. S. 183; and with respect to stockyards: *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. 839, 843.

It follows, therefore, that the fear of the majority of the Commission that the appellant will exact exorbitant compensation from the trunk-line railroads for loading and unloading their livestock, and that "barter and trade" methods will prevail unless it assumes jurisdiction over appellant has no sound basis.

IV

THE ORDER OF THE COMMISSION IS NULL AND VOID BECAUSE OF ITS FAILURE TO ACCORD APPELLANT THE CHARACTER OF HEARING REQUIRED BY LAW.

The proceeding before the Commission was held under the provisions of Section 15(7) of the Interstate Com-

merce Act, which authorizes the Commission to enter an order "after full hearing." The requirement of a full hearing is thus a condition precedent to the power of the Commission to act. *Morgan* v. *United States,* 304 U. S. 1, 14-15.[1]

Two hearings were held by the Commission, one in Washington before a member of the Commission and an Examiner, and the other at Chicago before an Examiner. It is the hearing held at Chicago of which appellant particularly complains.[2] At that hearing appellant attempted to show that the practical construction of the Interstate Commerce Act over the years by the Commission, the railroads and the stockyards had been that it was not applicable to stockyards performing loading and unloading for railroads, even where the conditions were similar to those now obtaining at Chicago. It also sought to prove material facts concerning other yards in rebuttal of evidence put in the record by the Commission and other parties to the pro-

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[1]The due process of law clause of the Fifth Amendment to the Constitution also requires that an administrative body must accord a fair hearing before it enters an order depriving any person of liberty or property. *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 524; *Interstate Commerce Commission* v. *L. & N. R. R. Co.,* 227 U. S. 88, 91; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Railroad Commission* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 393. This Court will probably not find it necessary to go beyond the statute to consider the requirements of the Fifth Amendment because the statute requires a "full hearing." *Cf. Morgan* v. *United States,* 298 U. S. 468, 477-478.

[2]The Commissioner presiding at the first hearing indicated that he would rule in the same manner as the Examiner later ruled at the second hearing, but the occasion did not arise for a specific ruling at that hearing except in connection with the proffer of evidence not of great consequence. (R. 272-273)

ceeding, and in support of its affirmative case. This evidence was detailed and comprehensive. It was objected to only on the ground it was immaterial and irrelevant. (R. 515-517) The Examiner, however, refused, arbitrarily we think, to allow appellant—

> (1) To present any evidence concerning the situation at any stockyard other than Chicago or any facts pertaining to such other stockyards, regardless of the character of the evidence or the reasons advanced for producing it;[3]
>
> (2) To make its record for review by offers of proof of specific facts, either oral or documentary, in the case of such rejected evidence, or to develop the evidence it so sought to prove by means of questions directed to the witness; or
>
> (3) Even to have the reporter mark for identification or to offer exhibits the Examiner conceived to be irrelevant or immaterial.

The rulings of the Examiner were not mere errors of judgment which arose during the heat of argument at the hearing. There was nothing casual about them. They were made as a result of a premeditated policy, announced when the occasion first arose, before argument, and consistently adhered to throughout the hearing. Appellant's witness was not even allowed to state his qualifications to

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[3]The scope of the Examiner's ruling is clearly indicated by his statement: "* * * that no matter what the conditions at other stockyards may be, those conditions cannot have any bearing upon or any effect upon the Commission's determination of the status of the Union Stock Yard and Transit Company." (R. 541)

testify to matters considered immaterial by the Examiner. The Examiner enforced these rulings rigidly at all times. His action was deliberate and calculated, and wholly improper.[4]

In a petition for further hearing before final submission appellant asked the Commission to overrule its Examiner and direct him to receive the evidence which he had rejected, or, in any event, to allow appellant to make specific offers of proof. (R. 164-199) The Commission denied this petition. (R. 199)

There are few principles in our law that are more firmly established than that the practical construction of a written document whose meaning is doubtful, be it a contract, a statute, or even the Constitution itself, will be given weight by the courts in determining its meaning. *Louisville & Nashville R. R. Co.* v. *United States,* 282 U. S. 740, 757; *Boston & Maine Railroad* v. *Hooker,* 233 U. S. 97, 118; *The Pocket Veto Case,* 279 U. S. 655, 688, 689; *American Asphalt Roof Corporation* v. *Atchison Ry. Co.,* 156 I. C. C. 147, 155.

The practical construction of a statute is of value not only where the administrative body charged with its enforcement acts under it, but also where over a period of time it fails to take action. In *Davis* v. *Manry,* 266 U. S. 401, 404-405; *Pennell* v. *P. & R. Ry. Co.,* 231 U. S. 675, 680; see also *United States* v. *C. St. P. M. & O. Ry.,* 43 Fed. (2d) 300, 305-306 (C. C. A. 8th).

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[4]The details which support the statements made in this and the preceding paragraph are found on the following pages of the Record: 280-281, 374-377, 380-382, 384-391, 420-421, 435-436, 439, 450-451, 484-485, 505, 507-517, 537-538, 548-550, 564.

Appellant proposed to show: (1) pertinent facts relative to the practice of the Commission over a period of many years in administering and construing the law with respect to stockyards throughout the country, where conditions are similar to those now existing at Chicago, which evidence would have included certified copies of records from the files and proceedings of the Commission itself showing the status and character of the companies operating such other stockyards, as well as other pertinent data, both documentary and oral, gathered as the result of a special study and investigation made by a witness exceptionally well qualified both as to experience and study to testify to such matters; (2) that there are approximately 135 other public stockyards in the United States under regulation by the Secretary of Agriculture, all of which perform loading and unloading services and are paid therefor by the railroads; (3) that the facilities and services of these other yards are not only similar to those at Chicago, but also that in many instances affiliations exist with the railroads serving such terminals; (4) that nearly all of the other public yards are the sole terminals for the handling of livestock in the respective cities where they are located, and that the comments made by the Commission in its report in I. & S. 4109 (the 1935 case) with respect to a practical monopoly apply with like force at such other points; and (5) that no one of the other yards is required by the Commission to file tariffs with it covering loading and unloading services performed for the railroads. (R. 164-199)

Appellant also offered to show that this situation has existed for years; that the Commission has known about it; and that the Commission, although it is charged with the duty of seeing that the Interstate Commerce Act is enforced

(Sec. 12), has never required any of these other yards to submit to its jurisdiction. (R. 178)

Appellant is not a common carrier. The Commission, however, conceives that certain portions of the Act bring appellant within its purview. The involved reasoning whereby the Commission reached such a conclusion in 1935 (I. & S. 4109) indicates quite clearly that it regards the meaning of the statute as not free from doubt. (R. 28-42) The fact that there were dissenting opinions in the present case also carries the same implication. See *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513-514. A copy of the Commission's report in the case decided in 1935 was introduced in evidence by the presiding Commissioner at the hearing in Washington. (R. 228) In these circumstances, appellant had the right to show that the Commission has, in practice, construed the Act as not applying to other stockyards where conditions are similar to those now existing at Chicago. See *Pennell* v. *P. & R. Ry. Co.*, 231 U. S. 675, 679.

There are other reasons why the Examiner should not have rigidly excluded all evidence concerning other stockyards. A full and fair hearing requires that a party be given an opportunity "to offer evidence in explanation or rebuttal," *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 93, as well as evidence showing the propriety of "the step asked to be taken." *The New England Divisions Case*, 261 U. S. 184, 200. To this end appellant should have been permitted to show facts concerning other stockyards of the character and for the reasons following:

1. In its report in I. & S. 4109, *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330 (the Commission's

own exhibit) the Commission advanced as a reason why the Interstate Commerce Act should be construed to apply to appellant the danger that the remedial purposes of Section 15(5) might not be fully accomplished if the railroads were left to barter-and-trade methods in procuring loading and unloading services necessary to complete the transportation of livestock to and from public markets, and that such charges, if unregulated, might result in higher rates to shippers. (R. 38)

Appellant was prepared to show the incorrectness of the Commission's premise by proving that even though the railroads employ the services of stockyard companies (all unregulated by the Commission except appellant) in loading and unloading livestock at all of the public yards of the country, there have been no substantial controversies over these charges except in two or three instances; that some yards publish their charges for such services in their tariffs on file with the Secretary of Agriculture; and that at other yards where so-called barter-and-trade methods obtain the railroads have been able to agree with the stockyard companies on the matter of charges without hardship to the railroads and without increasing their line-haul rates.[5] (R. 168) Appellant was also prepared to show by detailed evidence, both oral and documentary, that the facts and circumstances at other yards are not essentially different from those obtaining at Chicago. (R. 168-169)

The Interstate Commerce Act must be construed as one of general application. No part of it can be considered

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[5]An offer of proof respecting some of this evidence, in language no more specific than the foregoing, brought forth the following comment from the Examiner: "* * * I want to state here these offers giving the details of the testimony are not going to be accepted." (R. 388-339)

as applying only to Chicago. The best proof, therefore, on the question of whether the remedial provisions of Section 15(5) can be carried out without regulation of stockyards by the Commission is the nation-wide experience of the railroads in the absence of such regulation. Nevertheless, the Examiner refused to allow appellant to introduce any such evidence.

2. Certain evidence concerning other yards was admissible on still another ground. In its report in I. & S. 4109 (the Commission's own exhibit) the Commission said:

> "It has been urged that the Secretary of Agriculture would have jurisdiction over the charge. We are of the view that he would not have such jurisdiction whether or not the same is reposed in the Commission." (R. 38)

As tending to show that the Secretary, who is the administrative officer charged with the duty of carrying out the provisions of the Packers and Stockyards Act, 1921, had for many years agreed with its construction of that Act, appellant should have been permitted to show that at many yards, under conditions similar to those obtaining at Chicago, the loading and unloading charges are included in tariffs on file with the Secretary, and that these charges are paid without question by the railroads, including those roads protesting in the proceeding before the Commission. (R. 169-170)

Moreover, in the present case, appellant is not seeking to escape all regulation, but is merely asserting its legal right not to be kept in the difficult position of trying to obey two masters. As evidence of its good faith, its Vice-President stated under oath that appellant, if held not to

be a common carrier by the Commission, would publish its loading and unloading charges in its tariffs filed with the Secretary of Agriculture. (R. 327) In order to show that this offer would not have been futile, appellant should have been allowed to prove that the Secretary permits other stockyards so to publish their loading and unloading charges with him. (R. 170)

3. The Commission's own exhibit contained the dissenting opinion of Mr. Commissioner Meyer in I. & S. 4109. Four Commissioners did not participate in that decision. (R. 42) The Examiner had no right to presume that in this proceeding the four non-participating Commissioners or other Commissioners could not have been persuaded on brief or oral argument that the views of Mr. Commissioner Meyer were sound. In order that it could make such an argument, appellant was entitled to lay a factual basis for it. The Examiner, therefore, should have permitted appellant to show that the situation at Chicago is not essentially different from the situation at other stockyards, and to show that the principles announced in the *Kansas City* case cited by the dissenting Commissioner (R. 57) are basically as sound today as when announced.[6] Obviously, this could not be adequately done by confining the evidence to facts pertaining only to Chicago. The Examiner should also have allowed appellant to show that railroads in many instances employ non-carrier companies or individuals other than stockyards to perform transpor-

[6]The Examiner would not even let the witness state his qualifications to discuss this subject in so far as it related to other yards. (R. 387-388)

tation services for them without subjecting such parties to regulation. (R. 185, 470, 567-568)

4. A copy of the report of the Commission in *Live Stock Loading and Unloading Charges,* 61 I. C. C. 223, was incorporated by reference in the record by stipulation of the parties at the instance of the protestant carriers and without limitation as to use. (R. 249) It thereupon became a part of his evidence in the case. *Kansas City Southern Ry. v. Albers Commission Co.,* 223 U. S. 573, 596.

Speaking of the loading and unloading services at western stockyards in the exhibit so introduced in evidence, the Commission said:

> "Except for variations in the size of the properties and in the volume of traffic, the arrangement of facilities and the character of operations in the particular service are much the same at the several yards." (R. 641)

The exhibit having been admitted in evidence, and counsel for the railroad protestants having indicated that he might use any report for any purpose (R. 289), appellant clearly had the right to submit evidence to explain the statement above quoted, bring it up to date or otherwise amplify it.

5. The protestant railroads introduced an exhibit showing rail receipts at the Chicago yards on the theory that "it is quite important to show that this Union Stock Yards Company stands over at the neck of the bottle and unloads more than 100,000 cars a year and says nobody can come on the place to do it * * *." (R. 342, 733-735) The Examiner also stated that he wanted this information. (R. 343)

In its decision in I. & S. 4109, introduced as an exhibit, the Commission attached great importance to the fact that most of the livestock at Chicago is handled through appellant's yards and to the further fact that appellant insists on performing the loading and unloading services. (R. 36)

Appellant was prepared to show that protestants and the Commission itself attached too much importance to the facts mentioned, and that no reason peculiar to appellant's yard in Chicago warrants its being set apart for regulation by the Commission. (R. 173) A partial showing was made by testimony to the effect that the livestock business is such that a large volume of livestock can be handled only at a terminal market (R. 416), and that livestock must be loaded and unloaded by experienced livestock handlers familiar with stockyard property, regulations and practices. (R. 284-286)

Appellant should have been permitted to complete this proof by showing that under conditions similar to those obtaining at Chicago (1) at practically all livestock markets one stockyard company, served by all trunk-line railroads, handles the bulk of the business; (2) at all public markets stockyard employes perform the services of loading and unloading rail-borne livestock; (3) all stockyard companies have always insisted on doing this work because there would be endless confusion, slowing up of operations and inefficiency if the stockyard companies did not perform the loading and unloading services; and (4) such companies have always held themselves out to perform these services. (R. 173-174) Appellant was also prepared to show that "bottle neck" conditions relatively similar to those obtaining in Chicago obtain at practically all of the public stockyards. (R. 174) See *Stafford* v. *Wallace*, 258 U. S. 495.

No technical objections were raised as to the character of this evidence, the only objection being as to the materiality and relevancy. (R. 515-517) The Examiner, however, excluded it under his blanket ruling, and adhered to this ruling notwithstanding the fact that its relevancy and materiality were pointed out to him from time to time by counsel for appellant. (R. 508-510, 517-537, 541) The Examiner's refusal to admit this evidence was erroneous, and his conduct in that respect, we believe, arbitrary and unreasonable.

Not only did the Examiner exclude evidence concerning other stockyards, but he pursued his rigid policy much further. He would not permit appellant's witness to testify (or even to qualify to testify) as to analogous situations, such as the handling of cotton by independent companies for railroads at transit points, the handling of commodities by lighterage companies or by dock companies for railroads at ship-side (R. 567-568), or pick-up and delivery services performed by truckers for the railroads. (R. 470)

The Examiner, however, did not stop with refusing to permit appellant to prove material facts concerning other yards; he even refused to permit it to have marked for identification or to offer exhibits containing facts that he considered immaterial or to make offers to prove specific facts.[7] This was done deliberately and consistently through-

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[7]The Examiner, it is true, did offer to permit counsel for appellant to make "general observations" concerning and "state generally" what appellant proposed to prove (R. 381), but forbade the making of offers of proof of specific facts. (See, *e.g.*, R. 381, 538, 549) He stated that he would permit counsel to read "the title of the exhibits you have that you desire to offer in this connection" (R. 511), but refused to allow appellant to have the exhibits marked or to offer them in evidence. (See, *e.g.*, R. 538, 549) The Commission in its

out the hearing.[8] (R. 374-376, 380-381, 388-389, 507-508, 511, 538, 549-550, 564-569)

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report attempts to excuse the Examiner on the ground that the general character of the rejected evidence appears in the record. (R. 26) The right to make specific offers of proof of rejected evidence, including the right to have exhibits containing such evidence marked for identification and offered, is uniformly recognized. *Chicago & Alton R.R. Co.* v. *Fietsam*, 123 Ill. 518, 522, 15 N. E. 169; *Maxwell* v. *Habel*, 92 Ill. App. 510, 512; *Fidelity & Casualty Co.* v. *Weise*, 80 Ill. App. 499, 513; *Sellers* v. *State*, 7 Ala. App. 78, 61 Sou. 485, 488; *Spurlock* v. *State*, 17 Ala. App. 109, 82 Sou. 557, 558; compare *Herencia* v. *Guzman*, 219 U. S. 44, 46; and *Packet Co.* v. *Clough*, 20 Wall. 528, 542-543. General offers of proof are not sufficient; they must be specific. *Central Pacific R.R.* v. *California*, 162 U. S. 91, 117; *Goodrich* v. *City of Chicago*, 218 Ill. 18, 23, 75 N. E. 805; *Elliott's General Practice*, 714; 64 *Corpus Juris*, 127-129. This Court has held that the Commission is required in proceedings conducted by it "to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Commerce Commission* v. *L. & N. R.R. Co.*, 227 U. S. 88, 93. The right to make offers of proof of evidence, both oral and documentary—whether viewed as a rule of evidence or a rule of procedure—is a fundamental rule by which a litigant asserts and defends his rights, and is an essential part of a fair hearing.

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[8]The scope of the Examiner's rulings is shown by the following portions of the record:

Record 538:

"Mr. Gladson: And, Mr. Examiner, do I correctly understand you that your ruling is that you won't permit any evidence pertaining to facts and circumstances at these other stockyards, these other posted stockyards?

"Examiner Carter: Yes, sir.

"Mr. Gladson: And am I correct also in my understanding that you won't permit us to mark any exhibits pertaining to these other yards for identification?

"Examiner Carter: That is correct.

Whether the Examiner was laboring under the mistaken impression that exhibits merely marked for identification

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"Mr. Gladson: Or that I won't be permitted to put questions to this witness concerning the facts and circumstances of these other yards and offer specific proof concerning such facts?

"Examiner Carter: That is true."

Record 549:

"Mr. Gladson: * * * I want to make my record as to what I want to prove so that when the commission or the courts get it they will know specifically what I expected to prove by this witness. * * *

"Examiner Carter: I am not going to permit the detailed offer of testimony which I have ruled is inadmissible.

"Mr. Gladson: And that includes—you are not going to permit, as I understand it, the marking of these specific exhibits and offering them in evidence. Am I correct in that understanding?

"Examiner Carter: Yes, I think you are—that is my ruling.

"Mr. Gladson: And as far as the specific evidence which this witness is going to make orally in connection with these various stockyards, am I correct in my understanding that the Examiner will not permit that evidence to be developed * * * in question and answer form?

"Examiner Carter: That is correct."

With reference to certain pages of an exhibit for identification which contained railroad tariffs showing rates to markets other than Chicago, the following colloquy is enlightening (R. 566):

"Mr. Gladson: * * * You don't mean by that, Mr. Examiner, that they will be physically removed from the file and be destroyed, or something of that sort?

"Examiner Carter: They will be physically removed from that exhibit and a notation made of what was physically removed.

"Mr. Smith: That is exactly what ought to be done with them. They ought to be taken out and thrown in the fire, if the Examiner please. * * *"

or offers of proof might somehow be treated as evidence without being admitted as evidence,[9] whether he felt bound to follow a similar ruling made as to an offer of proof by the Commissioner who presided at the first hearing[10] (R. 272-273), or whether something else prompted him to take such action, does not appear in the record. But whatever may have been the reason, the effect was the same: to deny

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[9]There are indications that the Examiner may have labored under this mistake. (R. 435-436) See *Byerley* v. *Sun Co.*, 181 Fed. 138, 142-143, wherein the Court pointed out the fallacy of any such theory. See also *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Shelton* v. *Holzwasser*, 91 N. Y. S. 328, 329; and *Casteel* v. *Millison*, 41 Ill. App. 61, 65-66.

[10]Apropos of the discussion at the first hearing on this subject the statement of the Court in *City Railways Company* v. *Carroll*, 206 Ill. 318, 328-329, 68 N. E. 1087, is enlightening:

> "No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

to appellant a full opportunity to have the Examiner's rulings reviewed by the Commission[11] or the District Court.[12]

The Examiner, however, allowed protestants and himself the widest latitude in going into the purposes and motives of appellant. (R. 307 *et seq.*) This was carried even so far as to inquiring whether appellant was sponsoring certain proposed legislation in Congress (R. 314); what brought about the investigation in a valuation proceeding concerning appellant's stockyard then pending before the Secretary of Agriculture (R. 330); whether the Secretary had fixed the rates of appellant (R. 318-319); and whether appellant had been successful from its inception with practically no regulation by the Secretary of Agriculture. (R.

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[11]In its petition for further hearing before final submission appellant was unable to set forth specifically the evidence which it wished to adduce and which the Examiner had refused to receive for the reason that Rule XV(b) of the rules of practice of the Commission requires that in such a petition "the *nature and purpose* of the evidence to be adduced *must be briefly stated.*" (See R. 737 and *National Wholesale Grocers' Assn.* v. *Director General,* 69 I. C. C. 669, 675.)

In its petition appellant, after referring to this rule, stated that it was prepared, if the Commission desired, to submit the exhibits which the Examiner had refused to permit to be marked for identification and a detailed statement of the evidence which it would have offered if it had been permitted by the Examiner so to do; but the Commission denied the petition without allowing appellant an opportunity to submit the exhibits or statement. (R. 198-199)

[12]The Examiner must have understood that this would be the effect of his rulings because counsel for protestants, in objecting to appellant's making specific offers of proof and discussing what happened at the first hearing, said: "* * * and the Commissioner has ruled that the Commission would not hear these detailed offers of proof that were simply designed to get into the record in another way a record which they desired to take to court." (R. 386)

315-319) He permitted the railroad protestants to introduce as an exhibit a small section of the cross-examination of the government witness by appellant's counsel on rate of return in the valuation proceeding before the Secretary of Agriculture[13] (R. 320-321, 729-730); a reply to a protest filed in another case to which reply appellant was not even a party (R. 321-322); and a draft of a proposed contract for additional compensation submitted by appellant to the railroads several years ago but never executed. (R. 307-308, 561-562)

The Examiner himself elicited information that one of the purposes of appellant in seeking to withdraw its tariffs was to increase its charges (R. 311); inquired about increases in yardage and other charges (R. 360); and allowed protestants to go into the question of increases in rates for ordinary stockyard services (R. 330-331); yet when appellant sought to explain this testimony by showing the recent

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[13]The purpose of this exhibit apparently was to bind appellant by the implications of questions put by its counsel in cross-examining a witness in another case. (R. 315-316) The admission of the exhibit was strikingly improper for several reasons: (1) any evidence concerning regulation of appellant by the Secretary of Agriculture (except evidence with respect to the regulation of loading and unloading charges, which the Examiner rejected) was immaterial to the issues in the case; (2) whether appellant had been successful with or without regulation by the Secretary was likewise immaterial; (3) whether regulation by the Secretary had been efficient was a matter primarily with which Congress should be concerned; and (4) it would work untold hardship on the litigants for any tribunal to establish as a principle that they are bound by the implications of questions put by their counsel. This is particularly true in connection with cross-examination where counsel is given much latitude in both the form and substance of questions in testing the knowledge or conclusions of witnesses.

decline in its revenue and its need for more income, the Examiner sustained an objection to such evidence when appellant refused to accept a condition imposed by the Examiner that it furnish information concerning the measure of appellant's yardage rates more than 20 years ago, which information the Examiner had previously held to be immaterial. (R. 428-430, 331-332) The Examiner also declined to permit appellant to show the proportions of revenue derived from loading and unloading charges and from ordinary stockyard services except on the same condition. (R. 336-337)

That the rejected evidence may have affected the result is evidenced by the concurring report of Commissioner Aitchison, in which he said:

> "Accepting the ruling on evidence to be the law of the case, as it has been passed upon by the Commission, I concur in the result. However, I believe the objection to the testimony offered should have been overruled, as it appears to me to be relevant and material. What the decision would be with the proffered evidence before us can not now be determined."[14] (R. 42)

The refusal to receive the evidence which we have been discussing was so fundamental as to justify the setting aside of the order of the Commission if this Court finds itself unable to say on the present record that appellant is beyond the purview of the Interstate Commerce Act. As this Court said in *Morgan* v. *United States*, 298 U. S. 468, 480, in discussing the "full hearing" required by the Packers and Stockyards Act:

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[14]Commissioner Eastman was also of the opinion that the rejected evidence should have been admitted. (R. 45)

"Facts and circumstances which ought to be considered must not be excluded."

CONCLUSION

The reasoning by which the Commission reached the conclusion, upheld by the District Court, that a public stockyard company which does not carry persons or property from place to place, and does not possess or operate the locomotives, cars, tracks and other necessary facilities for carriage, is nevertheless a common carrier by railroad because it loads and unloads a particular class of freight as an agent for trunk-line railroads is unsound and unwarranted by the language of the Interstate Commerce Act. The hearing in the proceeding in which the order was entered was contrary to established principles embodied in the "full hearing" required by the Act as well as by the Constitution. The decree of the District Court, which dismissed appellant's bill of complaint, should be reversed, and the case remanded to the District Court with directions to set aside the order and enjoin its enforcement and operation.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Title 49 U. S. C. Interstate Commerce Act provides

"Section 1. Regulation in general; * * *.—(1) Carriers subject to regulation.—The provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

"From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

"(2) Transportation subject to regulation.—The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

"(a); (b); (c) [Exceptions immaterial to this case.]

"(3) Definitions.—The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

"(4) Duty to furnish transportation and establish through routes; division of joint rates.—It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, * * *

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"Section 6. Schedules and statements of rates, etc., joint rail and water transportation. — (1) Schedule of rates, fares, and charges; filing and posting.—Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *

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"Section 15.

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"(5) Transportation of livestock in carload lots; services included.—Transportation wholly by

railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

* * * * * * * *

"(7) Commission to determine lawfulness of new rates; suspension; refunds.—Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commis-

sion, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *

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"(13) Allowance for service or facilities furnished by shipper.—If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

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"Section 20. Reports, records and accounts of carriers; mandamus; liability of initial carrier for loss, etc.—(1) Annual reports of carriers; contents; uniform accounts.—The commission is authorized to require annual reports from all common carriers subject to the provisions of this chapter, and from the

owners of all railroads engaged in interstate commerce as defined in this chapter, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the commission may require; and the commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a period of time within which all common carriers subject to the provisions of this chapter shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"(2) Period covered by and time for making reports; monthly and special reports; penalty for omissions.—Said detailed reports shall contain all the required statistics for the period of twelve months

ending on the 30th day of June in each year, or on the 31st day of December in each year if the commission by order substitute that period for the year ending June 30th, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this chapter shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

* * * * * * * *

"(5) Forms of accounts and records; depreciation charges; access to records, etc., by commission.

—The commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The commission shall, as soon as practicable, prescribe, for carriers subject to this chapter, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this chapter shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, and kept or required to be kept by carriers subject to this chapter, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and it may employ special agents or

examiners, who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence on February 28, 1920, or thereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this chapter.

"(6) Failure to keep accounts and records, or submit same to inspection; penalty.—In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of $500 for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this chapter.

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"Section 20a. Securities of carriers; issuance, etc.—(1) 'Carrier' defined.—As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation

organized for the purpose of engaging in transportation by railroad subject to this chapter.

"(2) Issuance of securities; assumption of obligations; authorization.—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities' or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[PUBLIC, No. 51—67TH CONGRESS]

(U. S. C., title 7, secs. 181-229)

[H. R. 6320]

An Act to Regulate Interstate and Foreign Commerce in Livestock, Livestock Products, Dairy Products, Poultry, Poultry Products, and Eggs, and for Other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title I.—Definitions

This act may be cited as the "Packers and Stockyards Act, 1921."

SEC. 2. (a) When used in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible;

(4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead;

(5) The term "livestock products" means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points

within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

(b) For the purpose of this Act (but not in anywise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

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Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the

business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

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[1] Amended by an act of Congress approved May 5, 1926.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule

so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(i) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or

different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2)

by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be

made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary, after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as be-

tween persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions or subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Title IV.—General Provisions

SEC. 401. Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

SEC. 402. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

SEC. 403. When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer,

stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

SEC. 404. The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.

SEC. 405. Nothing contained in this Act, except as otherwise provided herein, shall be construed—

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, the Interstate Commerce Act as amended, the Act entitled "An Act to promote export trade, and for other purposes," approved April 10, 1918, or sections 73 to 77, inclusive, of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended by the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February 12, 1913, or

(b) To alter, modify, or repeal such Acts or any part or parts thereof, or

(c) To prevent or interfere with any investigation, proceeding, or prosecution begun and pending at the time this Act becomes effective.

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commis-

sion, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

(b) On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, or under section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and except when the Secretary of Agriculture in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

SEC. 407. The Secretary may make such rule, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of any money in the Treasury not other-

wise appropriated, such sums as may be necessary for such purpose.

SEC. 408. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 15, 1921.

APPENDIX B

Certified Copy of Opinion of The Municipal Court of Cincinnati in case of *The Cincinnati Union Stock Yard Company* v. *The New York Central Railroad Company* (unreported).

#233982

THE MUNICIPAL COURT OF CINCINNATI

THE STATE OF OHIO
City of Cincinnati } ss.
Hamilton County,

I, ELMER F. HUNSICKER, Clerk of the Municipal Court of Cincinnati, and in whose custody the files, journals, dockets and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the original Opinion in case of *The Cincinnati Union Stock Yard Company* vs. *The New York Central Railroad Company* now on file in the office of the Clerk of the Municipal Court of Cincinnati, and that said foregoing copy has been compared by me with said original Opinion and that the same is a correct transcript thereof.

IN TESTIMONY WHEREOF, I do hereunto subscribe my name officially and affix the seal of said Court at the City of Cincinnati, this 15th day of February, A. D. 1939.

ELMER F. HUNSICKER
Clerk of the Municipal Court.

By BURTON D. HAUCK
Deputy Clerk.

[SEAL OF THE MUNICIPAL COURT]

STATE OF OHIO COUNTY OF HAMILTON

IN THE MUNICIPAL COURT OF

THE CITY OF CINCINNATI

THE CINCINNATI UNION STOCK YARD COMPANY, a corporation *Plaintiff,* —vs.— THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation *Defendant.*	CASE #233982 OPINION: Hess, *J.* 3-3-36.

This cause came on for hearing upon the pleadings and evidence, arguments, and briefs of counsel, and was submitted to the Court for determination. The testimony offered in this case is a transcript of the testimony presented to another Judge of this Court. The Judge to whom the matter was submitted retired from the Bench before deciding the case and by agreement of counsel the record made at the original hearing was introduced as evidence in this hearing.

The plaintiff brings its action on an account, in the short form, as authorized by Sec. 11334, G. C. of Ohio, and claims there is due it from the defendant the sum of Four Hundred and Seventy-three ($473.00) Dollars for loading and un-loading 473 decks of livestock at One ($1.00) Dollar per deck, from January 1, 1935 to August 1, 1935.

The defendant, in its statement of defense, admits that plaintiff rendered these services but claims in substance that the charges of the plaintiff are excessive and unreasonable and that neither this court nor any other court has jurisdiction to decide this controversy for the reason that the issues present a question under the Interstate Commerce Act and the Ohio Public Utilities Act, which can only be

determined by the Interstate Commerce Commission and the Ohio Public Utilities Commission.

To this answer the plaintiff filed a reply, by which the issues of law and fact are joined.

It appears from the testimony that there is no controversy in regard to the essential facts presented in this case. The undisputed and uncontradicted evidence was that the Cincinnati Union Stock Yard was incorporated in 1871 and since that time has continuously conducted a public stock yard in the City of Cincinnati, Ohio; that the plaintiff is posted as a public stock yards by the United States Department of Agriculture, under the Packers and Stockyards Act of 1921; that the charges for stockyards services are contained in tariffs filed with the Secretary of Agriculture, pursuant to the Packers and Stockyards Act; that the plaintiff is employed as an agent by the defendant and certain other carriers to load and unload their live stock consignments at Cincinnati from and into suitable pens at its yards in Cincinnati. Certain other services are rendered by the plaintiff to the defendant, incident to the handling of live stock shipments. Such services are clerical in nature and not an issue in this case.

On January 1, 1921, a certain contract was entered into between the plaintiff and the defendant's predecessor, which provides in substance that the plaintiff would render loading and unloading services for the defendant at its Cincinnati yard for the sum of eighty (80¢) cents per car; there are certain other provisions in the contract respecting duties and responsibilities of the parties, which are not important in this case.

"THIS AGREEMENT, made and entered into this first (1st) day of January, 1921, by and between the Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and The Cincinnati Union Stock Yards Company, a corporation, as Second Party, and →

WITNESSETH;

WHEREAS, the loading and unloading of ordinary live stock at public stock yards, except ordinary live stock unloaded or reloaded, en route in order to try an intermediate market, or stopped on account of quarantine regulation, becomes the duty of the carrier under the provisions of Paragraph 5, Section 15 of the Interstate Commerce Act, as amended February 28th, 1920, and which reads as follows:

> 'Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.'

NOW, THEREFORE, by reason of the premises and in consideration of the payments and mutual agreements hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Said Second Party will load or unload said ordinary live stock and will make and keep all records and

perform the necessary labor in connection therewith, including the following:

(a) Accurate count of all live stock loaded and unloaded.

(b) Accurate record will be kept of all live stock loaded and unloaded, with the ordinary notations as to the condition of the stock. In loading cars, said Second Party shall exercise due care to prevent the overloading or crowding of the stock.

2. That all services in connection with the loading and unloading of all shipments of live stock handled by said First Party as a common carrier, destined to, originating at, or which may be stopped en route for feed, water and rest at said Stock Yards of said Second Party, shall be performed by said Second Party. Said First Party agrees to pay said Second Party for its services under this agreement at the rate of eighty cents (80¢) per car of live stock loaded, unloaded, or reloaded, each operation being subject to a separate 80¢ charge, said payments to be made from month to month, upon presentation of bills therefor by said Second Party.

3. It is agreed that the amount of the charges assessed by said Second Party against the shippers for unloading and reloading ordinary live stock stopped en route to try the market or stopped on account of quarantine regulations shall be set out by said Second Party on "advance only" way bills to facilitate the collection of said charges by the First Party at destination.

4. As between the parties hereto, said Second Party agrees to exercise due diligence in the loading and unloading of live stock handled under this agreement and agree to indemnify, protect and save harmless said First Party against all loss and damage or expense on account

of its failure to exercise such diligence. Said Second Party shall be deemed to be in charge of and responsible and assume all liability, but as warehousemen only, for all stock handled by it for said First Party under this agreement, as follows:

(a) On inbound live stock from the time car door is opened by employees of said Second Party.

(b) On outbound live stock until said stock shall have been placed in cars and car doors closed.

(c) On live stock unloaded for feed, water and rest, stopped en route to try market, or stopped on account of quarantine regulations, the responsibility of said Second Party begins when the car doors are opened by employees of said Second Party and continues until said live stock is reloaded and the car doors closed. In connection with said live stock, said Second Party assumes the responsibility for reloading the identical stock that was unloaded, being liable only as warehousemen between the time of unloading and reloading. It is agreed, however, that said Second Party shall not reload stock unloaded for food, water and rest until after the expiration of the period provided by Statute and that stock unloaded on account of quarantine regulations shall not be reloaded until regulations have been complied with, and that said Second Party shall exercise due diligence in loading and unloading such stock. Said Second Party agrees to indemnify, protect and save harmless said First Party from any and all loss and damage or expense, incurred by said First Party account of the failure of said Second Party to comply with the provisions of this paragraph, notwithstanding anything set forth in this agreement as to the limitation of responsibility of said Second Party as being that of a warehouseman. Nothing in this Paragraph 4, shall make the Second Party responsible for injuries to said live stock caused

by the negligence of said party of the First Part or of its Agents or employees.

5. Said First Party, at its own cost and expense, agrees to place all cars for unloading and loading at appropriate pens, to be designated by said Second Party, and remove therefrom all empty cars and cars that have been loaded. Said Second Party agrees to give notice to said First Party as promptly as possible after cars have been loaded to enable said First Party to remove said cars.

6. This agreement shall be effective as of January first (1st), 1921 and shall remain in effect until terminated by either party giving to the other party, at its office in Cincinnati, Ohio, thirty (30) days' written notice of such party's intention to terminate, and shall then terminate at the end of said thirty days unless said notice is previously withdrawn.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement in duplicate on the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,

THE CINCINNATI UNION STOCK YARDS COMPANY."

Thereafter, on December 29, 1925, there was a modification of this contract, providing for the payment of 80¢ per car and it was agreed between the parties that 75¢ per deck would be the charge for loading and unloading services at the plaintiff's yards, effective January 1, 1926.

On November 19, 1934, the plaintiff caused a letter to be sent to the defendant, which reads as follows:

"Referring to our agreement with you dated as of January 1, 1921, as modified under date of January 1,

1926, for the loading and unloading of live stock, etc. at our yards in Cincinnati, we hereby exercise our option to terminate this agreement as of December 31, 1934. While we have the right under the contract to terminate on thirty days' notice, we give you this longer notice as a matter of courtesy.

"Beginning January 1, 1935, our charge will be $1.00 per deck of live stock loaded, unloaded or reloaded into railroad cars. Pending execution of a new contract to this effect, the other provisions of the agreement of January 1, 1921, will be operative.

"Kindly acknowledge receipt."

It appears from the record that plaintiff received no reply to this letter, at least prior to January 1, 1935, although several conferences were had after January 1, 1935, wherein the increased charge of plaintiff for loading and unloading services from 75¢ to $1.00 per deck were discussed.

The Court is unable to find any place in the record where the defendant requested that plaintiff discontinue its services, but it does appear from the record that the defendant availed itself of the services of the plaintiff for the entire period in question. The record discloses that the defendant received monthly statements from the plaintiff, which statements itemized the number of decks loaded and unloaded during the preceding month, at a charge of $1.00 per deck.

It is further shown by the record that the plaintiff company is not owned or controlled in any manner by any railway company. No railway company is a stockholder or railway officials officers of the plaintiff company. The plaintiff company is really independent of railway control or ownership. The plaintiff company owns no cars or locomotives or rolling stock of any kind. It does not now nor has it at any time filed tariffs with the Interstate Commerce Commission, nor has the Interstate Commerce Commission ever requested it so to do.

It does appear from the record that the plaintiff company owns all the stock of a paper corporation named the Cincinnati & Milford Railway Company. This corporation has never operated a railway nor acted in the capacity of a common carrier, although at one time it owned a switch-track connecting the B & O Railroad with the stock yards property.

The real question for the Court to determine is whether or not this Court has jurisdiction in a case involving the charges of the Cincinnati Union Stock Yard Company for loading and unloading services rendered to the defendant. The defendant claims that these charges are subject to the regulations of the Interstate Commerce Commission.

The answer to this question depends upon whether or not the plaintiff, in performing loading and unloading services, is a common carrier, engaged in transportation. If it is not a common carrier, engaged in transportation of an interstate commerce nature, then neither it nor its charges are subject to the regulations of the Interstate Commerce Commission.

In respect to the question of whether the Public Utilities Commission of Ohio has jurisdiction over any of the charges in question, it is agreed by counsel for both parties that if the Interstate Commerce Act does not apply the Public Utilities Act or Acts would likewise not apply.

The defendant questions that this action can be brought on an account in the short form. The Court is of the opinion that the action is properly brought on an account, by virtue of Sec. 11334 G. C. of Ohio.

Has this Court jurisdiction over the subject matter by reason of the fact that the plaintiff company has failed to file with the Interstate Commerce Commission tariffs regulating the charge for the loading and unloading service rendered by the plaintiff to the defendant company?

In order to answer this question, it is necessary to refer to the Interstate Commerce Act and to review pertinent cases in which the Courts have been confronted with similar issues.

Sec. 1 of the Interstate Commerce Act provides as follows:

"(1) CARRIERS SUBJECT TO REGULATION. The provisions of this chapter shall apply to *common carriers* engaged in—

"(A) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

". . .

"(2) TRANSPORTATION SUBJECT TO REGULATION. The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply . . ."

Subsection 3 of Sec. 1, defines a "common carrier" as used in the Act to include:

". . . all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as *common carriers* for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'."

The term "railroad" as used in the Act is defined to include:

". . . all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any *common carrier* operating a railroad, whether owned or operated under a

contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The term "transportation" is defined as including:

". . . locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It would appear from a reading of the above sections of the Interstate Commerce Act that it applies to common carriers engaged in performing transportation service. It would further appear that the controlling factor in deciding the Interstate Commerce Act's applicability is whether or not the person to be charged under the Interstate Commerce Act is engaged as a common carrier.

The defendant contends that the loading and unloading of livestock from the decks of cars is an incident to common carrier transportation. Section 15(5) of the Interstate Commerce Act has considered this point. This section reads as follows:

"TRANSPORTATION OF LIVESTOCK IN CARLOAD LOTS; SERVICES INCLUDED. Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stock yards shall include all necessary service of *unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens,* and *receipt and loading at such yards of outbound shipments, without extra charge* therefore to the shipper, consignee or owner, . . ."

This section has taken into consideration the question at issue in this case and places upon the railroad company or common carrier the responsibility of loading and unloading livestock. It does not designate that the common carrier must employ the services of any particular agency in the loading and unloading service but does place upon the common carrier the responsibility of seeing to it that this kind of service is done, and further places upon the carrier the duty of performing this service *without extra charge* to the shipper. The railroad companies are obliged, in many instances, to employ the services of persons, firms and corporations who have no connection whatever with the railroad except to perform a specific service for a consideration.

The Court then comes to the consideration of the question of where the right of the parties to contract between themselves and agree upon a sum to be paid for service stops and where the Interstate Commerce Commission must step in and make the contract for them.

The matter of charges made by stock-yards companies engaged in the same kind of service as that rendered by the plaintiff company in this case has been before the courts on many occasions. A review of those cases disclosed that the court has based the decision in each case upon the facts surrounding that particular case.

In the case of *Atchison, Topeka, Sante Fe Railroad Company* vs. *Kansas City Stock Yards Company*—30 ICC 992, decided in 1915, the Interstate Commerce Commission held that the Kansas City Stock Yards was not a common carrier. It arrived at this decision after a very careful analysis of the manner in which the Kansas City Stock Yards Company was operated. Again, in the case of *Union Stock Yards of Omaha* vs. *The United States*—169 Fed. 404, it was held that the stock yards company was not a common carrier and thus not amenable to the Safety Appliance Law. The Court in that case uses significant language:

"It must be conceded that the stockyards company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined. On the contrary, they include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies, for the delivery and receipt of shipment of live stock at South Omaha."

In the matter of the *Union Stock Yards and Transit Company of Chicago*, reported in 226 U. S. 286, the Court, after a very careful review of the manner of operation and property controlled by the Union Stock Yards Company, came to the conclusion that this stockyard, under the circumstances and facts relating thereto, was engaged as a common carrier and it will be observed from the opinion of the Court that the decision was reached solely on the facts as they applied to that case and that no definite example of demarkation between what constitutes common carrier and non-carrier service may be drawn, as applied to stock yard service.

The question of whether or not the Cincinnati Union Stock Yard Company is a common carrier has been before the Interstate Commerce Commission and the Courts. The case of *E. Kahn's Sons Company* vs. *B & O Railroad Company*, 192 ICC 705, and the decision in the case under the style of *U. S. of Amer. ex rel* vs. *Interstate Com. Com.*—74 Fed. 2nd Ed. 948, seem to prove conclusively that the Cincinnati Union Stock Yard Company is not a common carrier but as a matter of fact is a non-carrier corporation.

If, therefore, the Cincinnati Union Stock Yard Company is a non-carrier corporation, does the fact that it enters into a contract with a railroad company to perform services which the railroad company is obliged by law to perform make it, for the purposes of that contract only, a common carrier, engaged in transportation service which may come under the jurisdiction of the Interstate Commerce Commission?

The mere fact that the Cincinnati Union Stock Yards is a public utility does not of itself make it amenable to Interstate Commerce tariffs. There is nothing in the law which makes the railroad, or common carrier, use the service of the Cincinnati Union Stock Yard Company. If the railroad was by law obliged to use the services offered by the Cincinnati Union Stock Yard Company and the Cincinnati Union Stock Yard Company was by law obliged to render such service, then it would appear to the Court that there would be justification for the contention that some agency other than the contracting parties should decide what the charges for such services should be. There is nothing that the court is able to find which indicates that the services of the Cincinnati Union Stock Yard Company must be utilized by any of the common carriers shipping livestock into or from Cincinnati. They might well stop their trains at some other yards or place and arrange to perform their own loading and unloading service. The defendant is obliged, by reason of the regulations which the Court has already quoted, to absorb this service cost. Certainly there could be no question raised as to what the common carrier might spend to perform this service, in the event it undertook to perform the service itself. It might pay its employees large or small salaries.

It would appear in the case of the *U. S.* vs. *Union Stock Yard and Transit Company*, concerning the loading and unloading of livestock, which decision was rendered December 11, 1935, that the Interstate Commerce Commission reached its decision primarily on precedent, and since that

stock yards company has, by reason of its operation of railroads and interchanging directorate in the past established itself as a common carrier it is still a common carrier to such an extent that, in the opinion of the Interstate Commerce Commission it is to continue to be characterized as a common carrier. This is still another argument in support of the contention that the Interstate Commerce Commission and the Courts have seen fit to decide these stock yards service cases strictly and solely upon the facts surrounding each individual case or yard operation.

The Court is unable to find any law preventing the railroad company or common carrier from engaging the services of whoever it may deem necessary to assist it in its duty as a common carrier. The defendant company, in the instant case, by continuing to use the services of the Cincinnati Union Stock Yard Company, after notice of the increase in price from seventy-five cents (75¢) to one dollar ($1.00) per deck, pursuant to their contract, obligated itself to pay the amount stipulated in this contract. The Court is obliged to determine from the facts in this case and from the contractual relations of the parties, that the Cincinnati Union Stock Yard Company is not a common carrier; that the contracts between the defendant company and its predecessor and the Cincinnati Union Stock Yard Company were legal and valid contracts: and further, that the defendant company acquiesced in the terms and conditions of the rate of one dollar ($1.00) per deck.

Having considered the issues presented herein, the Court is of the opinion that the plaintiff is entitled to recover.

An entry may be drawn in accordance with this opinion.

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Supreme Court of the United States

OCTOBER TERM 1939

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

RALPH M. SHAW,
FREDERICK H. WOOD,
WILLIAM F. RILEY,
GUY A. GLADSON,
THOMAS T. COOKE,
BRYCE L. HAMILTON,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM 1939

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

No. 40

REPLY BRIEF FOR APPELLANT

Three briefs have been filed by the appellees: one by the Government and the Commission jointly, one by the Railroad intervenors, and one by the Livestock Association intervenor.

At the outset of its argument it is stated in the Railroad brief that the single question presented is whether the loading and unloading service in question—

> "* * * is performed by the appellant as a common carrier and subject, as such, to the provisions of the Act, or is performed in a strictly private capacity, and, therefore, not subject to the provisions of the Act." (Railroad Brief, p. 11)

This is an erroneous statement of the question presented. The appellant is not a private corporation but a public utility, and the primary question presented is whether

the charges of all public stockyards—of which the appellant is but one—for the loading and unloading of livestock at their yards are subject to the jurisdiction of the Secretary of Agriculture or the Commission.

The record does not disclose that the appellant occupies any particular status peculiar to itself and distinguishable from that of other public stockyards loading and unloading livestock. The Commission declined to receive evidence proffered by the appellant that it does not. In our opening brief we pointed out that there are no facts or circumstances which distinguish the appellant from other public stockyards loading and unloading livestock or from other persons or corporations performing transportation services, as agent of the carriers, by reason whereof the appellant is subject to the jurisdiction of the Commission and such others are not. (Opening Brief II, pp. 69-91)

The question is not whether the service performed is a transportation service as defined in the Interstate Commerce Act performed through the use of facilities defined as railroad facilities by that Act; whether the carriers are required, by reason of the circumstances surrounding the receipt and delivery of livestock at Chicago, to employ the appellant as their agent for the performance of the service in question; or whether the appellant holds itself out to perform this service as such agent—but whether the appellant is a common carrier. If not, its charges are not subject to the jurisdiction of the Commission any more than are those of any other person performing transportation services as a carrier's agent, whether through the use of facilities defined by the Act as railroad facilities or not. (Opening Brief, pp. 47-51)

I.

THE ARGUMENT THAT THE APPELLANT IS A COMMON CARRIER BECAUSE IT IS PERFORMING SERVICES WITHIN THE DEFINITION OF "TRANSPORTATION" THROUGH THE USE OF FACILITIES WITHIN THE DEFINITION OF "RAILROAD."

All of the appellees place primary reliance upon the definitions of "transportation" and "railroad" as contained in the Act. None of the appellees contends that the appellant is a common carrier within the ordinary meaning of that term. As pointed out in our opening brief, a person who is not a common carrier—within the ordinary meaning of the term—is not made one by the performance, as agent of the common carrier, of transportation services through the use of facilities defined in the Act as railroad facilities, as this Court and the Commission have held. (Opening Brief, pp. 47-51) That such was not the intent of the Act is disclosed by its legislative history (Opening Brief, pp. 51-59), and by the far-reaching consequences of a contrary interpretation. (Opening Brief, pp. 59-62)

Appellees would distinguish the status of the appellant from other agents performing services defined as "transportation" through the use of facilities embraced within the definition of the word "railroad" upon several grounds.

1. The monopoly argument.

First it is said that, by reason of the circumstances surrounding the receipt and delivery of livestock, the carriers are required to employ the services and facilities of the appellant in the loading and unloading of such stock. The

same is true where the carrier employs an elevator company, a wharfage company, a bridge company, a ferry company and many other persons performing services within the definition of "transportation," or furnishing facilities within the definition of "railroad." It is a matter of common knowledge that there is seldom more than one grain elevator in most communities and that at many ports there is but one public wharf, but it has never been held that either is a common carrier because it has a monopoly of the facilities and service necessary to commence or complete the transportation service required to be performed by the railroads where it supplies such facilities and service as the carriers' agent. (See discussion of *Munn* v. *Illinois*, p. 5 *post*.)

2. The holding out argument.

It is said that appellant holds itself out to perform loading and unloading service and on this account has become a common carrier. The tariff of appellant on file with the Commission,* however, states that the service is to be performed only "as a carrier's agent." (R. 16), and as was said in *Adams* v. *Mills*, 286 U. S. 397, 415:

> "* * * the tariff, as published, authorized only the collection of the charge as a carrier's agent."

Moreover, while such holding out may make the appellant a public utility subject to regulation, it does not make it a common carrier. It is a public utility. As such

*The tariff is filed with the Commission under compulsion of its decisions, the most recent, prior to the present case, being the case decided in 1935. (R. 23, 31)

it is subject to public regulation. This would be so whether it held itself out to perform the service for the shipper, or for the carrier and as its agent. The Act, however, does not give the Commission jurisdiction over all public utilities, but only over those which are common carriers.

Reference is made to the statement in *Stafford* v. *Wallace*, 258 U. S. 495, that a public stockyard is "an interstate commerce agency"; but this Court did not say that it was a common carrier, and its observation was made in support of the more general statement that a public stockyard was a public utility and, as such, subject to regulation. That such a yard is a public utility was held long ago as *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. 839, 183 U. S. 79, but as pointed out by this Court in that case it is "not a common carrier."* (Opening Brief, pp. 40-41) The fact that loading and unloading service is performed, as agent of the carriers, by another public utility (not itself a common carrier) lends no support to the argument that such utility is a common carrier subject to the jurisdiction of the Commission.

In *Munn* v. *Illinois*, 94 U. S. 113, grain elevators were held to be engaged in a business affected with the public interest—but not common carriers—because they were intimately connected with the rail transportation system and had a virtual monopoly. If appellant is a common carrier, a public grain elevator and a public wharfinger must also be common carriers; for under the Act the status of companies performing incidental transportation services for railroads is the same. (Opening Brief, pp. 50-51, 59-62)

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*See also *Nebbia* v. *New York*, 291 U. S. 502, 536.

3. The integral part of the service and facilities argument.

It is said that the facilities provided by appellant are an integral part of the terminal facilities of the carriers and that the service performed is an integral part of their transportation service. This is true whenever the carrier performs any of the sevices required of it through an agent and the use of the agent's facilities. For example, a carrier may employ the services of a warehouseman in connection with the receipt and delivery of freight. *United States* v. *B. & O. Railroad,* 231 U. S. 274; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501. Such employment involves both the performance of services within the definition of "transportation" and the use of facilities within the definition of "railroad," but the warehouseman does not thereby become a common carrier.

Such employment may not be used as a cloak for payment of rebates through allowances to the owner (cases *supra*), and such allowances are subject to the jurisdiction of the Commission if made in connection with property owned by the warehouseman—not because the warehouseman is a common carrier, but because allowances to the owners of property transported have been placed within the jurisdiction of the Commission by Section 15 (13) of the Act in order to prevent the payment of indirect rebates. (Opening Brief, pp. 38, 50-51; 62)

A carrier may make a public stockyards its depot for the receipt and delivery of livestock (*Central Stock Yards* v. *L. & N. Ry. Co.,* 192 U. S. 568), but the stockyards company does not thereby become a common carrier, although its yards become an integral part of the carrier's terminal

facilities. Carriers may thus designate non-carrier owned facilities as their terminal, but the owners thereof do not become common carriers even though they perform therein a part of the transportation services of the carrier. (See cases *supra*, and also views of Mr. Commissioner Porter, R. 50-54.)

Reference is made by appellees to *United States* v. *Brooklyn Eastern District Terminal Co.*, 249 U. S. 296; *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384; *McCabe* v. *Boston Terminal Co.*, 22 N. E. (2d) 33; *United States* v. *Atlanta Terminal Co.*, 260 Fed. 779; *Bordelon* v. *New Orleans Terminal Co.*, 14 La. App. 60; and *Spaw* v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 127. In each of these cases the defendant, a terminal company in a large city, operated and controlled a freight terminal or union station to which the public resorted.

In *United States* v. *Brooklyn Eastern District Terminal Co., supra*, it appeared that the Terminal Company was itself engaged in transporting property by means of car floats and also by means of locomotives operated by it. It was in that case that this Court held that whether a corporation was a common carrier was to be determined by what it did and not by what it was empowered to do. (Opening Brief, p. 77)

In the *McNamara* case the stock of the Terminal Company was owned entirely by two trunk-line railroads. It was thus operated in conjunction and affiliation with an interstate system of transportation, as in the case of the terminal in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, and as in the case of appellant at the time of the decision in *United States* v. *Union Stock Yard*, 226 U. S. 286. Whether the same was

true in the other cases cited does not appear, but it is a matter of common knowledge that terminal companies in our large cities are so owned and operated. In the *McNamara* case the Terminal Company had complete and exclusive control over the operations of the trains and shifted cars and made up trains with its own engines.

In *McCabe* v. *Boston Terminal Co.; supra,* the Terminal Company directed and controlled the movement of all trains, and the crews of the railroads using the station were required to obey its directions; it owned and operated the signals and switches, and was "in direct charge of all transportation occurring upon its premises." In *United States* v. *Atlanta Terminal Co., supra,* it was stipulated, without elaboration as to the facts, that the "movement [of trains] in the station or station grounds is under the direction and control of the Terminal Company station masters." In *Spaw* v. *Kansas City Terminal Ry. Co., supra,* the plaintiff was the general yardmaster of the Terminal Company and "his duties included the supervisory charge of the operation of all trains using the Terminal Company's tracks, the direction of affairs following wrecks and accidents thereon, including the clearing of the tracks, so that general traffic would not be hindered or obstructed." In *Bordelon* v. *New Orleans Terminal Co., supra,* the manner of operation is not disclosed, but the case turned upon a failure to meet a burden of proof imposed by state law.

As appears from the footnote on page 4 of the Railroad Brief, in connection with outbound shipments, the loading foreman of the appellant and a joint agent of the railroads merely "decide at which chutes the respective cars should be placed for loading," and as to inbound shipments, all that the appellant does is "gives information as to which

platform train will be unloaded." In so doing, the appellant does no more than is done by every large industrial plant having several loading or unloading tracks or platforms, and whose representative informs the railroad company as to which place cars should be spotted for loading or unloading—but this does not convert the owner of such industrial plant into a common carrier. Appellant has no control over tracks, which are under the control of the River Road, or over the trains or crews. The situation is thus wholly unlike cases of terminal companies which control the tracks and train operations thereover: (See views of Mr. Commissioner Porter, R. 53-54.)

4. Appellees have completely failed to distinguish the rule in the *Ellis* case.

Judged by what it does, the appellant is not a common carrier unless every person performing transportation services for a railroad as agent for a carrier becomes such. On this point *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, and *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, are controlling.

The appellees have failed completely to distinguish these cases. The only ground upon which they are sought to be distinguished in either brief is that the carriers are required to employ the services of the stockyards company for the loading and unloading of livestock, while in respect of private cars they may furnish the cars themselves or secure them from others. Since livestock is consigned to and from the stockyards, unloading and loading must necessarily be performed within the yards, just as loading and unloading of carload freight consigned to and from industrial establishments must be loaded and unloaded thereat.

Moreover, the premise upon which the attempted distinction rests is without foundation in fact. When the amendments out of which *Ellis* v. *Interstate Commerce Commission* arose were enacted, it is a matter of common knowledge that few, if any, carriers owned any refrigerator equipment, and it is believed that few own any today. As a practical matter they were, therefore, compelled to employ the refrigerator cars of private car lines, and most of them have continued to do so ever since. Theoretically, each carrier could have provided itself with the necessary equipment, but this would have been expensive and wasteful because of the seasonal character of perishable freight originating in one part of the country on the lines of one carrier or one set of carriers at one season of the year, and on the lines of others at other seasons. From a practical standpoint, carriers are as much required to use the equipment and service of private car lines in the handling of refrigerated traffic as they are to use the services and facilities of the appellant in the handling of livestock shipments to and from Chicago.

Finally, as we have previously stated, carriers at most places are required to use the services and facilities of elevator operators and wharfingers and the facilities of bridge companies, although perhaps theoretically they could provide their own. As is pointed out in our opening brief (pp. 50-51), the allowances made to elevators are perhaps the most complete analogy to the situation presented here. The elevation of grain is a transportation service as defined by the Act, and the elevator itself is included within the definition of a railroad; yet it has never been contended that the elevator operator is a common carrier. If he is

the owner of grain passing through his elevator, the allowances made to him for that service are within the jurisdiction of the Commission under Section 15 (13) in order to avoid indirect rebating; but, as held by the Commission itself, where he is not such an owner, the Commission has no jurisdiction over the payments made to him by the railroad for the services performed. *Keystone Elevator & Warehouse Co.* v. *Director-General*, 73 I. C. C. 273. (See also views of Commissioners Eastman and Porter quoted in our Opening Brief, pp. 17-18, 22-23.)

Appellees have completely failed to point out any distinction between the status of the appellant and that of any other person performing transportation services as the agent of the carrier, whether through the use of service or facilities within the definition of the terms "transportation" or "railroad" or not.

II.

THE ARGUMENT BASED ON SECTION 15 (5).

It is believed that the arguments of the appellees in so far as based on this section are completely anticipated and answered by our opening brief. (I, 6, pp. 63-69) This section neither in terms confers jurisdiction upon the Commission to determine the loading and unloading charges made by a stockyard for services performed as the agent of the carrier nor provides that such stockyard company becomes a common carrier by their performance. On the contrary, it forbids the making of any charge whatever to the shippers at whose instance it was said to have been

passed. As pointed out, its purpose was not to protect the railroad company against the exaction of an exorbitant charge at the hands of a stockyards company, but to require the railroad company to perform loading and unloading service, whether by itself or through an agent, without the making of any additional charge therefor.

That such was its purpose appears upon the face of the amendment itself and from its legislative history. As pointed out by Mr. Justice Stone in his dissenting opinion in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, it was enacted for the protection of the shipper so as to require that all services in connection with the transportation of livestock to and from public stockyards, including their loading and unloading should be performed by the railroad at a single rate. Congress did not concern itself with the charge to be made by the stockyards company to the railroad. It is said the shipper pays such charge. He does not, any more than he pays the cost of labor, rails, materials and fuel which enter into the cost of transportation. Congress might have specifically provided that payments by the railroad should be subject to the jurisdiction of the Commission, but it did not do so.

If a public stockyards, such as appellant, be held to be a common carrier it must be by some other provision of the Act than this. The character of the service performed and the status of the company performing it was not changed by this section. If a public stockyard loading and unloading livestock is a common carrier, it was such before the passage of this amendment. If it was not one then, it was not made one thereby.

III.

THE ARGUMENT THAT THE PURPOSES OF THE ACT WILL BE DEFEATED UNLESS THE APPELLANT BE HELD TO BE A COMMON CARRIER.

The railroads in their brief exhibit great apprehension that unless the appellant be held to be a common carrier the Government or the Commission will be unable to compel the performance by them of the duties imposed upon them by the Act. The Act makes it the duty of the railroads to transport livestock, as well as all other kinds of freight, upon request, and, in the case of livestock shipments to and from public stockyards, to provide for the loading and unloading thereof without extra charge.

The duty to furnish transportation upon request existed at common law, and the duty to provide for the loading and unloading of livestock at the public stockyards in Chicago without additional charge existed by reason of common usage prior to the enactment of Section 15 (5). *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.* The performance of these duties, if refused, may be enforced by mandamus or other appropriate process. But the railroads say that they are compelled in the performance of these duties to make use of the facilities of the appellant (and presumably of other public stockyards) and that "Unless there is direct jurisdiction of appellant under the Act, appellant has an absolute veto power over the great movement of livestock to and from the public stockyards at Chicago." The railroads thus paint the picture of a possible and complete stoppage of such shipments because of the refusal of the appellant to perform as agent for the railroads those services which they are unable to perform for themselves.

Quite aside from the fact that if the appellant or any other public stockyards should assume such an attitude it would destroy its own business, the argument overlooks the fact that at common law a public stockyards was itself a public utility required to furnish service upon request and at reasonable rates. (Opening Brief, pp. 40-44, 101-102) That duty has now been made statutory, and its charges for all of its services, including those provided in connection with the "receiving * * * holding, delivery, shipment * * * or handling in commerce of livestock" have been placed under the jurisdiction of the Secretary of Agriculture. (7 U. S. C. secs. 201, 205, 206)*

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*At various places in their brief the railroads criticise appellant for attempts to increase its charges. (See, *e.g.*, Railroad Brief, p. 27) We have always understood that the motive of a litigant is legally immaterial. *Gregory* v. *Helvering*, 293 U. S. 465, 469; *U. S.* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269. The Examiner himself inquired into the matter of appellant's motives and charges; but when appellant sought to show a recent decline in its revenue and its need for more income the Examiner, on objection of counsel for the railroads, refused to receive the testimony unless appellant would furnish information which the Examiner had previously ruled immaterial. (See Opening Brief, pp. 118-119.) Quite aside from the legal inconsequence of motive, the motives of appellant are not in fact improper. The record shows that its receipts of animals declined from 18,653,539 in 1924 to 9,621,640 in 1936. (R. 735) Appellant has sought to secure some of this needed revenue by increasing yardage and other charges paid by the owners of livestock (R. 330-331), and likewise expects the railroads to pay a fair amount for the extensive facilities and service which it furnishes to them.

IV.

PRIOR DECISIONS OF THIS COURT RELIED UPON BY THE APPELLEES.

United States v. *Union Stock Yard,* 226 U. S. 286, is fully reviewed and analyzed in our opening brief. (II, 1, 2, 3, pp. 69-88)

While *Adams* v. *Mills,* 286 U. S. 397, was not decided until 1932, the charges to which it related were collected between December, 1917, and February, 1920 (286 U. S. at 405), prior to the lease to the New York Central subsidiary in 1922, which destroyed the conjunction in ownership, operation and service between the appellant and an operating railroad company. Under the 1913 lease in effect at the time of the movement of the shipments, appellant received a flat rental from its railroad affiliate and not a division of earnings theretofore in effect. Although in the proceeding before the Commission appellant had contended that by reason of this change the decision in *United States* v. *Union Stock Yard, supra,* was no longer applicable and that it was not a common carrier, the point was not made in this Court, nor was it considered or decided by it. As said by Mr. Commissioner Eastman:

> "Past decisions of the Supreme Court that it [*i.e.,* appellant] was such a carrier rested upon its conjunction in ownership, operation, and service with a line of railroad. Such conjunction ceased when the line of railroad was leased, practically in perpetuity, to the New York Central." (R. 43)

We believe the interpretation placed upon the decision in *United States* v. *Union Stock Yard, supra,* by Commis-

sioner Eastman to be a correct one. If not, then the decision is clearly irreconcilable with the subsequent decisions in *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra.*

Atchison, T. & S. F. Ry. Co. v. *United States,* 295 U. S. 193, known as the *Hygrade* case, upon which appellees lay great stress, is reviewed in our opening brief. (III, pp. 99-100) While in the *Hygrade* case the appellant contended that under the conditions existing since the lease of 1922 it was not a common carrier subject to the jurisdiction of the Commission (R. 701-708), the point was neither decided by this Court nor necessary to the decision rendered. Mr. Justice Stone stated at the conclusion of his dissenting opinion:

> "In the present state of the case it is unnecessary to consider whether the reparations part of the order was rightly directed to both the stock yards and the carriers, or should have been directed to the carriers alone."

Thus neither the majority nor minority expressed any opinion as to whether the stockyard company was a common carrier against which an order to make reparation might run.

Appellees rely upon the statement in the majority opinion that—

> "The statutes cited clearly disclose intention that the jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends."

The appellees construe this as equivalent to a statement that the Commission has jurisdiction over the charges which the stockyards company makes for the performance of the

loading and unloading service, and that the jurisdiction of the Secretary of Agriculture is confined to the other charges which it makes. We do not so construe it. (Opening Brief, pp. 99-100) The Commission unquestionably has jurisdiction over the railroads. If they fail to provide loading and unloading service themselves or through an agent without extra charge, they will have violated the law to which the Commission may require them to conform. It does not follow that the charges made by the stockyards company to the railroad company for the performance of this service are subject to the Commission's jurisdiction. If the Court intended so to indicate, then the statement is clearly dictum and a dictum irreconcilable with *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra.*

The statement in the majority opinion upon which appellees rely is completely explained by the fact that the Court was speaking from the standpoint of the shipper or consignee of the livestock, and was not passing upon the question whether the Commission had jurisdiction of payments made by railroads to a stockyard company employed by them to perform a service owed by them to the shipper or consignee. As Mr. Commissioner Eastman stated:

> "* * * although the law has made the loading and unloading of the livestock a duty of the railroads, it is a duty which must be performed, when the livestock is delivered to or received from a public stockyards, through the agency of those who are in charge of the stockyards, because it is essentially a part of the stockyards service.
>
> "While this may seem to be an anomalous situation, it is one which need give rise to no overlapping of jurisdictions or difficulties of administration. *So*

> *far as the shippers are concerned, the loading or unloading of the livestock is a railroad service the compensation for which must ordinarily be included in the line-haul rates, and we have full jurisdiction over those rates, and also over any separate charges which the railroads may at times assess for the service. So far as the railroads are concerned, the loading or unloading is a service which must be performed for them, at a public stockyards, by those in charge of the stockyards, because it is an inextricable part of stockyards service.* It follows, therefore, that the charges made against the railroads for such service at a public stockyards are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act." (Italics ours; R. 44-45)

Denver Union Stock Yard Co. v. *United States,* 304 U. S. 470, is discussed in our opening brief. (III, pp. 99-101) As is pointed out, since the loading and unloading service was not covered by the order of the Secretary of Agriculture fixing rates, the stockyard company had no constitutional right to have the facilities included in the rate base. That is all that was decided by this Court. Whether in refraining from fixing any charges for the loading and unloading service the Secretary erroneously followed the interpretation placed upon the Packers and Stockyards Act by the Interstate Commerce Commission is immaterial. Since he did not fix them, the value of the facilities employed in such service was clearly properly excluded from the rate base.

We think it is plain that the decision in *United States* v. *Union Stock Yard, supra,* is no longer controlling since

the factual foundation therefor has ceased to exist, and that the question of appellant's status was not raised or decided in *Adams* v. *Mills, supra.* We also think the appellees have misapprehended what was in reality decided in the *Hygrade* and *Denver* cases. If, however, the statements relied upon in those cases are to be interpreted as they have been interpreted by the appellees, then it is respectfully submitted that by reason of the irreconcilable conflict between such interpretation and the decisions in *Ellis* v. *Interstate Commerce Commission, supra,* and *United States* v. *Interstate Commerce Commission, supra,* the question should be reconsidered in the light of the provisions of the Interstate Commerce Act relied on and their legislative history. So considered, it is, we think, plain that neither the appellant nor any other public stockyards, any more than any other agent performing transportation services for the railroads, is a common carrier.*

*The railroads mention the fact that appellant has in the past invoked the processes of the Interstate Commerce Act for the purpose of increasing its charges (Railroad Brief, pp. 35, 40). The fact is that appellant invoked the jurisdiction of the Commission under legal and economic compulsion. (R. 288, 290) Even if the facts were otherwise, jurisdiction of subject-matter could not be conferred upon the Commission by any action of appellant, nor could the right of appellant to raise the question be waived by prior inconsistent conduct. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 475; *Lambdin* v. *Commerce Commission,* 352 Ill. 104, 185 N. E. 221, 222; *Malina* v. *Oplatka,* 304 Ill. 381, 136 N. E. 666, 668; *Union Indemnity Co.* v. *Railroad Commission,* 187 Wis. 528, 205 N. W. 492, 496; *Great Lakes Stages* v. *Public Utilities Commission,* 120 Ohio St. 491, 166 N. E. 404, 406.

V.

THE JURISDICTION OF THE SECRETARY OF AGRICULTURE.

Appellees assert that Section 406(a) of the Packers and Stockyards Act (7 U. S. C. sec. 226) preserves jurisdiction of the Commission over loading and unloading service. The railroads go so far as to assert that this section "is clear legislative recognition that Congress had already given the Commission jurisdiction over stockyard owners with respect to certain matters, which jurisdiction it did not intend to disturb," and that "Jurisdiction over the loading and unloading services and charges is the only jurisdiction of the Commission *over stockyards* to which Section 406 of the Packers and Stockyards Act could have referred." The railroads thus contend that any public stockyard company which performs loading and unloading service is subject to the jurisdiction of the Commission.

Section 406(a) contains no mention of stockyards. The Interstate Commerce Act, with exceptions here immaterial, applies only to common carriers engaged in transporting persons or property from place to place by rail. The only purpose of Section 406(a) was to preserve the existing powers of the Commission over common carriers by rail. Congress did not want the railroads to be in position to contend that the duty imposed upon them by Section 15(5) of the Interstate Commerce Act to load and unload livestock at public stockyards without extra charge to the shipper had been impliedly repealed by the Packers and

Stockyards Act. If Section 406(a) had not been included in the latter Act, the railroads would have been in a position to contend that they had no obligation at public yards beyond the placing of their cars at the loading and unloading docks.

Reference is made by the railroads to certain bills introduced in Congress in 1937, the purpose of which, they assert, "was to transfer jurisdiction of the loading and unloading services performed by stockyards companies from the Interstate Commerce Commission to the Secretary of Agriculture."* As we read the bills, their purpose was merely to clarify the existing law; but, in any event, they do not amount to a Congressional recognition of any jurisdiction in the Commission over loading and unloading because neither of them was ever enacted.

Although vigorously supporting the rulings of the Examiner which prevented appellant from showing that the Department of Agriculture has for many years received stockyard tariffs naming loading and unloading charges, and that the railroads, including those before this Court, have paid the charges in such tariffs without question (R. 169-170), the railroads (on p. 54 of their Brief) cite a letter of the Secretary set forth in the record of the hearings of a Sub-Committee of the Senate in order to show the current view of the present Secretary of Agriculture. The letter indicates quite clearly a misunderstanding of the effect of Section 15(5) of the Interstate Commerce Act

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*The railroads here admit that other stockyard companies perform loading and unloading services. (Railroad Brief, p. 53.)

and of the decision of this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* the so-called *Hygrade* case.*

In support of their contention that the Commission has exclusive jurisdiction over appellant's loading and unloading service, the railroads argue that under appellant's theory there would be dual jurisdiction of the Commission and the Secretary over the service, and that administrative conflict and confusion would be inevitable. They assert that an order by the Commission against the trunk-lines would be wholly nugatory because they would not be able to make it effective; that, if the Commission found that the requirements of the Interstate Commerce Act were not being satisfied, proceedings against appellant would have to be instituted before the Secretary; and that the rights of shippers under the Interstate Commerce Act might be found to be different from what appellant was required to furnish under the Packers and Stockyards Act. Section 15 (5) of the Interstate Commerce Act does not prescribe the manner in which the service shall be rendered. All the carrier is required to do is to load and unload without extra charge to the shipper. The situation is no different from that obtaining in states where public elevators and public wharfingers are regulated; the Interstate Commerce Commission regulates the relation between the railroad and the shipper and the state agency the relation between the railroad and the elevator or wharfinger.

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*The letter states that loading and unloading are actually performed for the railroads by the stockyards, a fact which, as we have previously pointed out, the railroads now admit. In *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 67, it would seem that the Secretary investigated but made no change in loading and unloading charges.

The regulation of loading and unloading charges by the Commission and of other stockyard charges by the Secretary would be impracticable, and would subject all stockyards to dual regulation by the Commission and the Secretary of Agriculture, as is the present situation in the case of appellant. The value of facilities (*e.g.*, general office building, pens and alleys) employed in serving railroad as well as non-railroad patrons must be apportioned between the two classes of patrons. General overhead expenses incurred in serving both classes of patrons (such as salaries of officers and clerical force and wages of stock handlers and watchmen) must also be properly divided. Livestock does not arrive at the yards in an even stream, and a large force must be kept on hand at all hours of the day and night, prepared to handle whatever quantity may arrive. (R. 250-251, 258) In connection with the cost of labor alone, a difficult problem arises in the apportioning of idle time as between railroad and non-railroad customers. The Secretary, who now actively regulates most of appellant's activities (R. 417-418), is in a better position than the Commission to view the picture as a whole and make the proper allocations of value and expenses. If appellant were subject to the dual jurisdiction of the Commission and the Secretary and each regulatory agency should institute a rate proceeding in which identical records were made, the Commission and the Secretary in their respective proceedings might reach different conclusions as to the allocation of value and expenses, and their respective orders conceivably might be upheld by the courts in separate court proceedings, if supported by substantial evidence, even though the allocations made in the two cases resulted in no allowance to appellant for part of the idle time on labor.

If the Commission had jurisdiction over loading and unloading charges of public stockyards, the Commission would have exclusive jurisdiction over their accounts, and they would be unable to keep any accounts, records or memoranda other than those prescribed or approved by the Commission. (Opening Brief, p. 61) The jurisdiction of the Secretary over the accounts, records and memoranda of public stockyards conferred in Section 401 of the Packers and Stockyards Act would be rendered nugatory. (7 U. S. C. sec. 221) The very fact that Congress gave the Secretary jurisdiction over accounting matters of stockyard companies indicates quite clearly that it did not intend Section 406(a) should be construed to mean that the loading and unloading service of stockyards should be subject to the jurisdiction of the Commission; for Congress was presumably aware of the decision of this Court in *Interstate Commerce Commission* v. *Goodrich Transportation Co.*, 224 U. S. 194, where it was held that the Commission had exclusive jurisdiction over the non-carrier as well as carrier accounts of a company which was engaged in common carriage. The record shows in detail many of the intricate records and memoranda which a public stockyard must keep in order to maintain a proper record of transactions and activities. (R. 577-600) Appellant is now confronted with the difficulty presented by the fact that the Commission and the Secretary do not agree as to the records it should keep. (R. 418)

The railroads' theory, moreover, disregards intrastate shipments. In states such as Illinois where there is no statutory provision corresponding to Section 15 (5) of the Interstate Commerce Act, the loading and unloading charges on intrastate shipments would be subject to no

regulation. Under appellant's theory, intrastate shipments from and to public stockyards would be subject to the jurisdiction of the Secretary of Agriculture because they are part of a stream of interstate commerce. *Stafford* v. *Wallace*, 258 U. S. 495.

Commissioner Eastman, who has had many years of experience in the field of regulation and may be presumed to know more about the subject than counsel for the railroads, was of the opinion that from an administrative standpoint the construction of the Acts urged by appellant "would simplify matters, in comparison with the situation which will result from the decision of the majority." (R. 45)

VI.

THE HEARING ACCORDED BY THE COMMISSION.

In an effort to divert attention from the real issue, the railroads argue that appellant attempted to force the Commission to undertake a sweeping, nation-wide investigation and determine the status of 135 other public stockyard companies and the status of other companies engaged in performing services for railroads. The status of these companies, of course, could only be determined in proceedings in which they were parties. Appellant did not request the Commission to enter into any such investigation. What appellant attempted to show was the practical construction of the Act by the Commission, the railroads, and public stockyard companies throughout the country. Appellant had the evidence and was prepared to introduce it, and no order entered by the Commission could have judicially or quasi-judicially determined the status of companies not before it.

Since the record shows the general nature and purpose of the evidence which appellant sought to introduce, it is argued by appellees that a full hearing was granted. The law is clear, however, that a litigant has a right to make offers of proof, and that such offers must be specific. (See authorities cited in footnote on p. 114 of Opening Brief.) If appellant had made a general statement of the evidence it wished to offer, as the Examiner suggested, it would probably now be confronted with a contention that the statement failed to show precisely the facts which it sought to prove.

The rulings of the Examiner cannot be sustained on the ground that at most the evidence would have tended to show that there were other stockyards which had not observed the law, as appellees suggest. The evidence was designed to show that the Commission throughout the years, with knowledge of the facts, had correctly construed the Act as not applicable to public stockyard companies by not requiring them to observe it. (R. 178) The Commission is required by Section 12 of the Act to execute and enforce its provisions, and its failure to do so in the case of 135 other public stockyards, as appellant wished to show, amounted to a practical interpretation of the Act as not applicable to such yards.

The railroads assert appellant did not seek to show a uniform practice or interpretation, and could not have done so because the Commission had in fact applied the Act to appellant. The rule that the practical construction of a statute whose meaning or application is doubtful shall be given great weight does not require a showing of absolute uniformity in practice. If appellant had been permitted to do so, it would have shown that the practice has been uniform in respect of 135 other public stockyards, and that

appellant is the only public stockyard in the country which the Commission has required to file tariffs covering loading and unloading service. (R. 178)

In a further effort to justify the conduct of the Examiner, the railroads state that appellant in its brief claims it was not permitted to have its excluded exhibits marked for identification and that this statement is untrue. The statement ascribed to appellant is not the one made in the brief. In that document appellant contended that the Examiner arbitrarily refused to permit it *"to have the reporter* mark for identification or to offer exhibits the Examiner conceived to be irrelevant or immaterial." (Opening Brief, p. 104). When the excerpt from the record quoted by the railroads is carefully read in connection with portions they did not quote, it will be seen that the Examiner would not permit appellant to have the reporter mark the exhibits with identification numbers for the record, that he would not permit appellant to offer them in evidence, and that he offered to allow appellant to put some private unofficial marks on the exhibits for the purpose of arguing their admissibility and mailing them to the Commission with any petition that appellant might wish to file.* (R. 540-543, 548-550, 570)

A litigant has the right to have the reporter mark exhibits for identification without even asking permission of

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*The railroads apparently seek to convey the impression that appellant does not seriously question these rulings of the Examiner because of the fact that it did not submit the exhibits with its petition to the Commission, but merely offered to file them. (Railroad Brief, p. 77) This was due to the fact that counsel discovered that the rules of the Commission only permitted a petition containing a brief statement of the nature and purpose of the evidence sought to be adduced. (R. 198-199, 737)

the Examiner. After the exhibit has been so marked, the litigant has the right to establish its authenticity (if it is not certified) by a witness with knowledge, and after its authenticity is established, he has the right to offer it in evidence. The Examiner is then called upon to rule whether the exhibit will or will not be received in evidence, and if it is not admitted it should remain in the record as a rejected exhibit in order that the Commission and the courts may determine whether the Examiner erred in refusing to receive it in evidence. (See authorities cited in footnote on p. 114 of appellant's brief.)

An attempt is made by the railroads to justify the Examiner's arbitrary conduct in inquiring into the question whether appellant was sponsoring certain bills before Congress and proposing to increase its charges. Obviously, these matters had nothing to do with the issue whether appellant was or was not a common carrier.

The final contention made by the railroads is that the excerpt from certain statements of the Examiner quoted in a footnote on page 115 of appellant's brief would be more enlightening if the entire discussion had been quoted, and it is said that the colloquy in question ensued when it was discovered that certain data held inadmissible had nevertheless been physically incorporated in the record. Appellant made it clear at the beginning of the quotation referred to that the colloquy related to certain pages of "an exhibit for identification." (Opening Brief, p. 115, footnote; R. 565) The portions of the exhibit referred to had not as yet been offered, but had merely been marked for identification.* Counsel for the railroads are apparently under the

*The Examiner had only received in evidence the portions of the exhibit (a group of rate tariffs) which showed rates on livestock to Chicago. (R. 486)

impression (as the Examiner himself may have been) that an exhibit merely marked for identification somehow becomes a part of the record as evidence. This is not the law. (See footnote 9 on p. 116 of Appellant's Brief.)

CONCLUSION

It is respectfully submitted that appellees have not answered the contentions in our main brief.

Respectfully submitted,

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No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

No opinion was rendered by the specially-constituted District Court, but on March 9, 1939, its findings of fact and conclusions of law were entered (R. 116–119). The report of the Interstate Commerce Commission, upon which the challenged order is based (R. 22–56) is published in 227 I. C. C. 716.

JURISDICTION

The final decree of the District Court was entered March 9, 1939 (R. 119). Petition for appeal

was filed April 7, 1939 (R. 141), and was allowed the same day (R. 154). The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1931, c. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III) and Sec. 283 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). This Court noted probable jurisdiction on May 22, 1939.

QUESTIONS PRESENTED

In an Investigation and Suspension proceeding (Sec. 15 (7), Title I, Interstate Commerce Act), instituted upon protests of line-haul carriers entering Chicago, the Interstate Commerce Commission, following hearings, ordered appellant to cancel certain schedules in which appellant proposed to cancel its tariffs of charges for the unloading and loading of livestock and stated that "No tariffs of this company will be hereafter filed * * *". The questions presented are:

1. Whether appellant, in the performance of the services covered by its tariffs, is a common carrier subject to the Interstate Commerce Act.

2. Whether the refusal of the Commission to receive evidence, alleged to be competent and material, was arbitrary and therefore, erroneous.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of Illinois dismissing a suit against the United States and the Interstate Commerce Commission, brought by appellant, The Union Stock Yard and Transit Company of Chicago, to enjoin and set aside an order of the Commission. The order was entered in Investigation and Suspension Docket No. 4296, *Cancellation of Livestock Services at Chicago,* 227 I. C. C. 716 (R. 22–56). Appellant Yard Company, which was first held to be a common carrier subject to the Act in *United States* v. *Union Stock Yards Co.,* 226 U. S. 286, and has continuously since had its tariffs on file naming its charges for the unloading and loading of livestock, on December 15, 1936, filed with the Commission a supplement, to become effective January 15, 1937, in which it undertook to cancel its tariffs, (R. 7), contending that it was no longer a common carrier subject to the Act.[1] Upon protests (R. 18) of trunk-line carriers entering Chicago, the Commission suspended the supplement and instituted the proceeding under section 15 (7) of the Act. Representatives of various livestock associations intervened in opposition to the schedules of the Yard Company (R. 24). The hearings were held in Washington, D. C., and Chicago, and a large record was made, consisting of testimony

[1] Compare *Adams* v. *Mills,* 286 U. S. 397 at p. 413.

and exhibits. Brief and exceptions to the report proposed by the examiner were filed by the Yard Company, protestants replied thereto, and the parties were heard in oral argument (R. 22). On July 11, 1938, the Commission issued its report and order, requiring appellant Yard Company to cancel its supplement proposing cancellation of its tariffs. The same issues as to the Yard Company and its tariffs had been recently raised and considered in proceedings under section 15 (7) of the Act, and the same determination reached. Investigation and Suspension Docket No. 4109, *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. The report in that proceeding is incorporated by reference (R. 26, 25) and made an appendix to the present report. (R. 28.)

The Yard Company was organized in 1865 under charter from the State of Illinois, granting it the power to build, own and operate a stockyards and railroad, and for the latter purposes to exercise the power of eminent domain (R. 29, 116). The charter provided, among other things, that

> The said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the City of Chicago, the same with the tracks of all the railroads which terminate in Chicago, * * * and shall have the right and power to make such connections with such suitable side tracks, switches

and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies, which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; and shall have the power and authority to locate, and, from time to time, renovate, change, alter, construct, and reconstruct, and fully to finish and maintain its said railroad or roads, side tracks and connections, and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same, * * *. (R. 29, 646, 647.)

Under this authority the Yard Company acquired real estate, constructed a stockyards and approximately 300 miles of railroad tracks, consisting of main lines, connecting with trunk lines entering Chicago, and switches to various industries located adjacent to its tracks. (R. 26, 117.) It "leased its railway property in 1897, and prior thereto it permitted individual trunk line railroads to transport livestock, with their own engines and crews over its railroad tracks, to and from the Stock Yards. Its 1897 lease was to Chicago and Indiana State Line Railway Company, retaining

for itself the loading and unloading platforms, chutes, pens and other facilities in its stock yard." (R. 117, 338.) The lease was for a term of 50 years and for a rental of two-thirds of the profits from operation. In 1898 the lessee consolidated with another company which operated a belt line around the City of Chicago, the consolidated company becoming known as the Chicago Junction Railroad Company. In 1907 the Junction sold its belt line, retaining only those tracks and other railroad property leased from the Yard Company. (R. 231.) It "granted trackage rights to all the trunk line railroads entering Chicago, thus enabling such trunk lines with their own power to deliver livestock originating on their respective lines to the unloading platform of the Stock Yard Company." (R. 30, 232, 293.) The Yard Company, with its own employees and its own facilities, platforms, chutes and pens, performed the unloading and loading. (R. 30, 34, 293, 238.) About 1907 the Chicago Junction Railway and Union Stock Yards Company, a New Jersey Holding Company was organized and acquired all the stock of the Junction and practically all the stock of the Yard Company. (R. 30, 232.)

United States v. *Union Stock Yards*, 226 U. S. 286, was rendered December 9, 1912, on appeal from a judgment of the Commerce Court in an action brought by the United States, at the request

of the Commission, to enjoin, *inter alia*,[2] the Yard Company and the Junction "from further engaging in interstate commerce until they had filed tariffs as required by section 6 of the Act." (295) The lower court had held that the Junction was a common carrier subject to the Act and obliged to file its tariffs, but that the Yard Company was not a common carrier. This Court's decision on appeal, which will be later discussed, was that the lower court was right in holding that the Junction should file its rates and that it should also have held the Yard Company subject to the provisions of the Act. Following the decision, the Yard Company filed with the Commission its tariffs of charges for the unloading and loading of livestock. (R. 233, 288.)

In December, 1913, shortly after the above decision the lease to the Junction made in 1897 was cancelled and a new one entered into, whereby the Yard Company's railroad properties, except those used for loading and unloading livestock, were leased in perpetuity to the Junction at an annual rental of $600,000, in lieu of the two-third's share

[2] The Bill also sought to compel the Yard Company and the Junction to file reports in conformity with section 20 of the Act, to enjoin them and Pfaelser & Sons from carrying out a contract, alleged to be discriminatory and to work a rebate, and to enjoin the New Jersey Holding Company from carrying out its written guaranty of the contract. 192 Fed. 380, 382.

in the net profits of operation theretofore received. In May, 1917, the Yard Company, by tariffs filed with the Commission, increased its carload charges for loading and unloading livestock from 25 and 50 cents to 50 and 75 cents, respectively. The line-haul carriers refused to absorb the extra charge of 25 cents with the result that it was exacted from shippers. (R. 31, 340.) Subsequently, the Yard Company filed with the Commission a supplement to be effective September 1, 1917, in which it undertook to cancel its tariffs, contending that, because of the changes in its lease to the Junction, it was no longer a common carrier. A suspension proceeding was instituted, but before decision was reached in that proceeding, a complaint was filed with the Commission by the Chicago Live Stock Exchange against the Yard Company and the line-haul carriers, alleging that the extra charge of 25 cents was exacted under an unreasonable practice (R. 31, 340). The two proceedings were consolidated and in its reports (*Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 58 I. C. C. 164) the Commission found that the Yard Company continued to be a common carrier subject to the Act, that its proposed cancellation of tariff charges had not been justified; that the stockyards were, in effect, the live stock terminals in Chicago of the line-haul carriers, the Junction and the Yard Company (p. 162); and that the extra charge had been exacted under an unreasonable and unlawful prac-

tice. Awards of reparation were made [3] and upheld in *Adams* v. *Mills*, 286 U. S. 397.[4]

Appellant Yard Company's contention in the Commission proceeding herein involved, that it is no longer a common carrier subject to the Act is based on further changes made in the leases of its railroad properties. On May 19, 1922, the Junction made a lease indenture, joined in by appellant, subleasing the railroad properties held by it under the lease from appellant, and leasing other property, to the Chicago River & Indiana Railway Company, hereinafter called the River Road, for a period of 99 years and thereafter, at the option of the lessee, in perpetuity. The indenture provided for an annual rental of $2,000,000. All the capital stock of the River Road was at the same time acquired by the New York Central Railroad Company. Approval, with certain conditions imposed, of these transactions was granted by the Commission in the *Chicago Junction Case*, 71 I. C. C. 631, 150 I. C. C. 32.

This change in the lease status of the railroad properties occasioned no change in the services performed by the Yard Company in respect to the unloading and loading of livestock. This service, the Yard Company has always itself performed (R. 34,

[3] 100 I. C. C. 266; 144 I. C. C. 175.

[4] On certiorari from *Adams* v. *Mellon, Director General of Railroads and Union Stock Yard Co.*, 51 Fed. (2d) 620.

282), and since May 20, 1913, following this Court's decision in the *Union Stock Yards Case, supra,* under tariffs filed with the Commission.

Under the lease of May, 1922, to the River Road, the Yard Company covenanted that it would, when requested by the lessee and under the conditions specified, exercise in its own name and right, for the benefit of the lessee, its power of eminent domain granted in its special charter. (R. 667, 668.)

Meanwhile, paragraph (5) of section 15 of the Act was enacted February 28, 1920 (41 Stat. 486, sec. 418). It provided that "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading enroute, delivery at public stockyards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *." The Packers and Stockyards Act, approved May 15, 1921 (42 Stat. 159), by which public stockyards are subjected to regulation, expressly provides (Sec. 226) that nothing in the Act shall affect the power or jurisdiction of the Commission nor confer upon the Secretary any concurrent jurisdiction over any matter within the jurisdiction of the Commission.

Pursuant to the regulatory processes of the Act, appellant's charge for unloading livestock has been

increased from 25 cents per car to its present level of $1.25. *Live Stock Loading and Unloading Charges,* 58 I. C. C. 164, at p. 166; *Livestock Loading and Unloading,* 61 I. C. C. 223; *Loading and Unloading Livestock,* 83 I. C. C. 248.

THE PROCEEDINGS IN THE DISTRICT COURT

The case was heard by the three-judge court on February 20, 1939, on final hearing. The trunk-line railroads which were protestants against the Yard Company's proposed cancellation of its tariffs in the Commission proceeding and the National Live Stock Marketing Association intervened in support of the validity of the Commission's order. The only evidence introduced was that on behalf of the appellant Yard Company, consisting of a certified copy of the record before the Commission, a copy of the Commission's Rules of Practice and a copy of the Articles of Incorporation of the Chicago River and Indiana Railroad Company. (R. 158–159.)

Upon conclusion of oral argument, the court, after consideration, announced its decision to the effect that the services rendered by the Yard Company brought it within the jurisdiction of the Commission, under the provisions of the Act, and the order in question was valid and lawfully made. (R. 160.) No written opinion was rendered. Findings of fact and conclusions of law were filed March 9, 1939, and a decree entered the same day dismissing the complaint. (R. 119.)

SUMMARY

1. Appellant, in the performance of unloading and loading of livestock at its public stockyards in Chicago, is a common carrier subject to the requirement of the Act to maintain on file with the Commission its tariffs of charges for such service. Sec. 6 (1) (7) and Sec. 15 (7), Interstate Commerce Act. Even confining consideration to the statute as it stood at the time of this Court's decision (*United States* v. *Union Stock Yard*, 226 U. S. 286), that appellant was a common carrier subject to the Act, the changes made in its leases have not divested it of its common carrier status. Appellant is unseverably affiliated with its demised railroad, constructed under its special charter to connect its yards with the line-haul carriers terminating in Chicago, in that each is dependent upon the other and both were established years ago in a city of rapid expansion and growth. Appellant's unloading and loading services, which by long usage, are a part of railroad transportation of livestock, constituting the commencement and termination thereof (*Union Stock Yard Case, supra*), is indispensable to the completion of every shipment of livestock transported over its demised railroad to and from its platforms.[8] By

[8] See *U. S.* v. *Brooklyn Eastern Dist. Terminal*, 249 U. S. 296, in which this Court, speaking of the docks, warehouses, and car floats of that company, said that these "even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in

long usage and custom at the Chicago yards, the rates of the line-haul carriers include the unloading and loading into suitable pens without extra charge to the shippers. While appellant is agent of the line-haul carriers in that the latter are required to absorb its charges, it has itself the status of common carrier whose charges are required to be filed and made subject to regulation. *Adams* v. *Mills*, 286 U. S. 397, 415. In this respect it is like a switching carrier whose services have to be employed by a line-haul carrier in order to serve industries which the latter alone reaches. Such switching carrier, while acting as agent, is subject to the Act as to those services and its charges therefor are subject to regulation. Similarly, appellant alone can be employed by the line-haul carriers for the service and it is necessarily distinguishable in that respect from various other agents performing services within the definition of railroad transportation. Appellant is performing an essential part of the common carrier transportation of each shipment of livestock and while doing so as agent in the sense that its charges have to be absorbed by the line-haul carriers, it is an agent, which itself has status of common carrier and as such is subject to regulation of its charges.

2. The amendment of 1920, adding Section 15 (5) to the Act, confirms appellant's status of com-

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United States v. *Union Stockyard Co.* 226 U. S. 286, and the wharfage facilities in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

mon carrier in performing the unloading and loading of livestock. The amendment was enacted as a result of the controversy in *Adams* v. *Mills, supra,* and provided that "transportation wholly by railroad" of ordinary livestock destined to or received at public stockyards should include "all necessary service of * * * delivery * * * of inbound shipments into suitable pens and receipt and loading of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *." The undoubted purpose was to bring under a single railroad rate the transportation of livestock including the unloading and loading into and from suitable pens, but, equally important, there was the underlying purpose to bring it about that the complete transportation charge should be subject to regulation of the Commission. In 1921, the Packers and Stockyards Act (42 Stat. 159) was enacted, subjecting public stockyards to regulation by the Secretary of Agriculture. This Act expressly provided (Sec. 226) that nothing therein should affect the power or jurisdiction of the Commission, nor confer upon the Secretary, any concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission. *A. T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 201. *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 477. The situation then is this: That the railroad transportation of livestock includes the unloading and loading into and from suitable pens, without

extra charge to the shipper, which means that there must be a single rate and that appellant's charges for unloading or loading must be absorbed therein. As above said, appellant's demised railroad and its stockyards, both established years ago in a rapidly growing city are each dependent upon the other; and appellant's services of unloading and loading, necessarily unified to avoid congestion, constitute a part of railroad transportation, essential to the shipment of every carload of livestock to and from appellant's yards. As found by the lower court, there is no other way of unloading and loading livestock at appellant's yards. Appellant, while agent in performing such service, is itself a common carrier and its charges are subject to regulation. It is apparent that its charges are not like the expenses for fuel and other supplies spread over the field of a railroad's operations but are charges applying to each shipment, a component part of each rate, and obtainable only from appellant. Since they must be absorbed their level enters into the reasonableness of every rate on livestock. The Act's mandate that rates shall be reasonable has never been qualified nor the Commission's jurisdiction thereover. If it were true, as asserted by appellant, that the Secretary of Agriculture has jurisdiction over these charges. This would mean that a concurrent jurisdiction over the reasonableness of railroad rates had been conferred upon the Secretary

contrary to the saving clause in the Packers and Stockyards Act.

3. Appellant's contention that the Commission's refusal to permit their proffer of evidence in respect of other stockyards throughout the country was arbitrary, is clearly wrong. The Commission had before it a proceeding involving a particular public stockyards which, moreover, had had its charges on file since 1913 when it was declared by this Court to be a common carrier.

ARGUMENT

I. Appellant, in the performance of unloading and loading of livestock at its public stockyards, is a common carrier subject to the act

(1) Appellant's status as a common carrier under the Act as it stood at the time of this Court's decision in *United States* v. *Union Stock Yard*, 226 U. S. 286, has not been divested by the changes in its leases

The decision of this Court, *United States* v. *Union Stock Yard*, 226 U. S. 286, that appellant is a common carrier subject to the Act, stands unchanged. In urging that it has divested itself of this status by the changes made in the leases of its railroad, appellant's argument is substantially: That the decision, holding it to be a common carrier, was dependent upon its affiliation with the Junction, in part because the lease of its railroad to the Junction was then on a profit rental basis and in part because of the common ownership of the capital stocks of both companies by the New Jersey Holding Company; that whereas the

Holding Company continues to own the capital stocks of appellant and the Junction, nevertheless, by reason of the lease of the railroad properties (except the unloading and loading facilities) made in 1922 by the Junction and appellant to the River Road, appellant's affiliation with its railroad had ceased; and in effect that, with the termination of such affiliation, its services of unloading and loading, ending and commencing transportation of livestock hauled by the line-haul carriers under trackage rights directly to and from its platform, had ceased to be common carriage subject to the Act and its requirement for the publication and filing of charges with the Commission.

While appellant's affiliation with the Junction was relied on in the *Stockyards Case, supra,* it is obvious that, if that were the only, or even the most important, consideration, the Holding Company might equally have been held to be a common carrier subject to the Act.* Moreover, although appellant's affiliation is changed through the leases of its railroad, it is not terminated. Appellant is not affiliated with the present lessee of its railroad, the River Road, through ownership of the stock of the latter by the Holding Company, nor does it receive rental under the present lease on a profit sharing basis. But the two-third rental basis from the lease of its railroad (which was then to the Junction) was changed many years ago to a fixed

* *U. S.* v. *Union Stock Yard*, 226 U. S. 286, 296.

annual sum of $600,000, this being done December 1, 1913, shortly after the decision in the *Stockyards Case, supra.* (R. 294, 682.) *Adams* v. *Mills*, 286 U. S. 397, 413. Under the existing lease of 1922 to the River Road the rental is $2,000,000 per annum, payable quarterly to the Junction, except that the lessee is entitled to deduct therefrom and pay directly to appellant, on behalf of the Junction, the installments of rent as falling due under appellant's lease to the Junction of December 1, 1913, and supplements thereto (R. 658). Appellant is party to the lease, and is expressly included in many of its covenants.[1]

Appellant's view that there is here the usual affiliation of a lessor of a railroad with its lessee *and no more* is entirely wrong. Appellant exists by virtue of a special charter of the State of Illinois authorizing it to build and operate its stockyards, coupled with the mandate (R. 646) to construct a railroad adjunct thereto, that is, a railroad connecting its yards with all the railroads terminating in Chicago and for the principal uses of enabling transportation, either by itself or by the trunk lines, of shipments to and from its yards. Despite the fact that said railroad is "let or de-

[1]Appellant's brief (p. 89) makes some point of the fact that its 1913 lease made in perpetuity to the Junction was without so-called "defeasance clause" and that Illinois Courts hold that such a lease is equivalent to conveyance of the fee, but this conflicts with the recitals and much else (R. 664) in the lease of 1922 to the River Road which was submitted to the Commission and approval, necessary to its validity, obtained.

mised", it remains dedicated to such uses, certainly in the absence of authority from the Commission which cannot be read into its approval of the 1922 lease, but quite to the contrary. In short, appellant's affiliation with its lessee is not that of a mere shell corporation lessor of a railroad. Appellant and users of its service remain entitled to, and dependent upon, its demised railroad, and its railroad and all transportation over it to appellant's platforms remain, in turn, dependent upon appellant. Appellant has retained to itself the rendering of, and furnishing facilities for, that part of the transportation consisting of the unloading and loading of the livestock. That service is a common carrier service of transportation by railroad, because it is made so by the Act (Sec. 1 (3)); because it is a service long recognized as constituting the commencement and completion of railroad transportation of livestock. (*Stockyards Case, supra*, 304; *Adams* v. *Mills*, 286 U. S. 397, 410); and because as found by the lower court (R. 118, finding 12) "there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff."

The full significance of this finding should be appreciated. Every carload shipment of livestock to and from appellant's platform is dependent upon its demised railroad, a railroad long ago established, in a city of rapid expansion and growth, to connect the trunk lines with appellant's yards, also long ago established. Appellant's un-

loading and loading services are essential and indispensable to the completion of the transportation of every such shipment. If done by the line-haul railroads it would be common carrier railroad service. As done by appellant, its charges being absorbed by the railroads under duty imposed by long custom and usage (*Adams* v. *Mills*, 286 U. S. 397, 413), there is no room for regarding appellant as other than a common carrier, while it is an agent of the line-haul carriers, it retains its status as a common carrier (idem 415). As stated in the Commission's report, referring to the analogy drawn in the last-mentioned case between appellant and a switching carrier (R. 42):

> * * * While a switching carrier, making delivery of a shipment to an industry located on its line, is agent of the line-haul carrier, its switching charge is subject to regulation. Under the conditions existing at Chicago respondent's yards are substantially the sole terminal in Chicago for the receipt of livestock and, as to the unloading of shipments destined to the yards, the railroads have to employ respondent to perform the service. Consequently the freedom of bargaining commonly entering into the creation of the usual relationship of principal and agent is not possible. Respondent is agent of the line-haul carriers precisely as is a switching carrier completing delivery for a line-haul carrier because it, too, is a common carrier whose charges are subject to regulation.

In the *Stockyards Case, supra,* p. 304, it was said:

> "The transportation of live stock," said this Court in *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, "begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee."

The decision also referred to the fact that the services were railroad transportation services within the definition of Section 1 (3) of the Act (p. 308). That they are not performed as mere agent, without status of common carrier, is plain from what has just above been said. The decision also states, p. 305:

> * * * They (the Junction and appellant) are common carirers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems that use them.

In *Stafford* v. *Wallace,* 258 U. S. 495, this Court, referring to the Packers and Stockyards Act, said:

> The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It as-

> sumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois*, 94 U. S. 113. *Nor is there any doubt that in the receipt of livestock by rail and in their delivery by rail the stockyards are an interstate commerce agency. United States* v. *Union Stock Yards Co.*, 226 U. S. 286.

While the Packers and Stockyards Act is legislation that will be later dealt with, it will be seen that the Court's conception of a public stockyards in connection with its reference to the *Stockyards Case, supra,* is wholly at variance with the narrow interpretation given that case by appellant.

In the *Tap Line Cases,* 234 U. S. 1, the Court, again citing its 1912 decision in the *Union Stock Yards Case,* said:

> * * * the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. *It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character* (p. 24).
>
> Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the State. * * * They are engaged

> in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court (p. 26).

In *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919), the Court said:

> The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier.

Appellant relies upon *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, in which the Court held a car com-

pany from which the railroads rented cars and received an icing service not to be subject to the Act. The difference between vital terminal services and a railroad's supplies is exactly the difference above referred to. The distinction between the two is emphasized by the statement in the *Ellis* case, as follows:

> It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request. * * * (p. 443)

As the Court there states, the trunk line carriers may appropriately be charged with responsibility of providing necessary equipment and icing services. If they are unable to make satisfactory arrangements for such supplies or services with one agency they may do so with another, or they may supply the instrumentalities themselves. Wholly different is the situation as to the unloading and loading services at the Union Stock Yard, which by custom and usage are a part of railroad transportation, constituting the completion and commencement thereof and essentially has to be performed by appellant. Aside from the leases, there has been no change from the above to the present time. Something is said in appellant's brief to the effect that it does not control the movement of trains. Nothing is conceivable that could

more affect and control train movements than the unloading and loading services which it performs. Appellant is not subject to criticism for insisting upon performing that part of the transportation itself. Unified performances by the Yard Company is, in the nature of things, an essential to prevent car and train congestion; and the very necessity for unified performance is another reason why appellant is an agent, which has status itself as carrier.

(2.) The amendment of 1920, adding section 15 (5) to the Act, confirms the status of appellant as a common carrier

It is well known that the amendment of 1920, adding Section 15 (5) to the Act (41 Stat. 486) was enacted as a result of the controversy which finally led to the decision in *Adams* v. *Mills, supra,* wherein charges for loading and unloading of livestock were sought to be assessed against the shippers in addition to the rates for the rail movement. (See Commission's Report, R. 37; also discussion in dissenting opinion of Mr. Justice Stone in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* p. 207.) The purpose of this Act, passed before the Court's decision was made in *Adams* v. *Mills, supra,* was undoubtedly to bring under a single rail charge all services involved in the transportation of livestock up to and including the unloading into or the loading from pens but, as importantly, there was the underlying purpose to bring it about that the complete transportation charge should be subject to the Commission's

authority. This the Act accomplished by providing that "transportation wholly by railroad" of ordinary livestock destined to or received at public stockyards should include "all necessary service of * * * delivery * * * of inbound shipments into suitable pens and receipt and loading * * * of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * *."

In providing that the services in question should be embraced in "transportation wholly by railroad", Congress studiously resorted to the exact language of Section 1 (1) of the Act wherein it had defined the sort of transportation which, when performed by a common carrier, sufficed to subject the service and the carrier performing the same to the Commission's jurisdiction.

This purpose of Congress to deal with the service of loading and unloading from and into railroad cars as an inseparable part of rail transportation is further indicated in the Packers and Stock Yards Act, approved in 1921 (42 Stat. 159, 7 U. S. C. 181–231), subjecting stockyards to regulation by the Secretary of Agriculture. This act expressly provided (Section 226) that nothing therein should affect the power or jurisdiction of the Commission, nor confer upon the Secretary any concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission.

This statutory purpose to maintain the Commission's jurisdiction over services which are an essen-

tial part of rail transportation has been recognized by this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* wherein the Court said (p. 201):

> * * * Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

This purpose has been further recognized in *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, where the Secretary in valuing the property of a stockyard for the purpose of fixing charges for stockyard services was held to have properly omitted facilities used for loading and unloading livestock. The Court said (p. 477):

> * * * Appellant uses these facilities to unload and load livestock. That is a service for which the carriers pay appellant. Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities.

Appellant argues that it cannot be considered a "carrier" since, it says, the service involves no

carrying or transporting. Factually, of course, there is a movement of the commodity from the cars over or through especially provided facilities to the pens where delivery is made, or from the pens, in the case of loading. This movement, and the commodity during the movement, is under the control and responsibility of appellant which has assumed to perform the service. The means by which the transporting is accomplished and whether made without the use of vehicles seems unimportant. The movement is transportation in itself. As previously shown, loading and unloading of livestock at Chicago by long usage is an integral part of transportation and not merely a service connected with or incidental to it; and, more importantly for the purposes of this case, Congress with the remedial purpose of controlling the entire transportation charge to the shipper has expressly declared by Section 15 (5) that "transportation wholly by railroad" of livestock to or from public yards shall include these services. Appellant is thus engaged in the business of performing services which Congress has made an essential part of railroad transportation.

A very good statement of the principles properly applicable in such cases is made in 9 Am. Jur. Section 32, page 446, as follows:

> Persons performing service of an accessorial or incidental nature in connection with the transportation of property may be regarded as occupying the status of a com-

> mon carrier where such service involves the custody and control of the property and constitutes an essential part of the transportation. It is otherwise where the service in question is not in its nature an act of carriage or an essential part of the actual transportation, as has been held in the case of icing or refrigeration service.

That the stockyards are terminals of the railroads is recognized in many decisions, including *Adams* v. *Mills, supra,* (p. 409) where the Court said:

> That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so.

The argument that appellant cannot be held to be a common carrier by railroad because factually it does not operate a railroad is thus without weight. Services which factually do not comprise the operation of a railroad are not infrequently dealt with as such in the scheme of regulatory legislation. Thus in *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382, the operation of a ferry was considered properly authorized by the Commission as constituting an extension of a line of railroad. In *McNamara* v. *Washington Terminal Company,* 37 App. D. C. 384, the Court said:

> It is contended that the Washington Terminal does not own a car nor carry a passenger, and cannot therefore be held to be a common carrier. * * * To make it a common carrier within the commerce

> clause of the Constitution, it is not necessary that it should own a car or carry a passenger. * * * Neither do we think it is necessary that a railroad should actually own cars in order to be a common carrier engaged in interstate commerce. It is sufficient if it owns and controls one of the instrumentalities essential in carrying on trade and commerce between different points, without the use and subjection to the control of which such trade and commerce cannot be conducted.

The loading and unloading service in question and the facilities necessary therefor are here provided by appellant. The charge therefor at so much per car is paid by the railroads and absorbed in the rail rates charged the shippers. The fact that appellant, in performing this service is agent of the railroads does not in any sense import that appellant is not at the same time a common carrier.

In *Adams* v. *Mills, supra,* the Court, referring to the accepted status of appellant in that case as a common carrier said, at p. 415:

> It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.,* 268 U. S. 366; *Union Stockyards Co.* v. *United States,* 169 Fed. 404. 406.

This analogy drawn in the above case between appellant's services and those of a carrier per-

forming switching service as agent for another, is an aid in emphasizing the most important feature of the case. For the Commission is by no means of the view (R. 39) that every corporation, performing as an agent for a railroad services which fall within the definition of transportation, thereby itself becomes a common carrier. By reason of natural causes appellant and its demised railroad are dependent the one on the other, and appellant's unloading and loading services are a part of and essential to the transportation of every shipment of livestock to and from the platforms, and its charges have to be absorbed in the rail rates of the line-haul carriers which by long usage, and now by statute, must include all transportation service in order that there be no extra charge to shippers in the sense that a single rate shall cover all. Yet there is no qualification, or ever has been, to the statute's mandate that rates shall be reasonable. *Atchison, T. & S. F. Ry. et al.* v. *United States,* 279 U. S. 768, 776, 777. Appellant, in performing the services for charges that have to be absorbed to make a single rate to shippers, has a monopoly of such service. And this is not meant as criticism, nor is any warranted. Under the conditions existing at the yards it is essential that the performance thereof be unified. The service is an essential part of transportation and appellant performs it as agent, itself having the status of common carrier, subject to regulation

of its charges. Because of its importance in the case the following is repeated from the Commission's report (R. 41–42):

> * * * This analogy, drawn between respondent's service and that of switching carrier, in completing a transportation is, we believe, particularly apposite here. Although a measure of competition exists between carriers, including switching carriers, one thing that made regulation of their charges necessary was that, in respect of a great deal of their service, competition was [fol. 53] absent. While a switching carrier, making delivery of a shipment to an industry located on its line, is agent of the line-haul carrier, its switching charge is subject to regulation. Under the conditions existing at Chicago respondent's yards are substantially the sole terminal in Chicago for the receipt of livestock, and, as to the unloading of shipments destined to the yards, the railroads have to employ respondent to perform the service. Consequently the freedom of bargaining commonly entering into the creation of the usual relationship of principal and agent is not possible. Respondent is agent of the line-haul carriers precisely as is a switching carrier completing delivery for a line-haul carrier because it, too, is a common carrier whose charges are subject to regulation.

Appellant's contention that its charges are in the category of expenses which are spread over the general operations of a carrier is plainly not

the case. They are charges applicable to each particular car handled and which enter directly into the cost to the carrier of completing the line haul which they undertake with respect to the delivery of any car of livestock. They are, in truth, charges applicable to a specific portion of the line haul. There can, of course, be no effective control of the entire line-haul rate in the interest of the shipper when an essential portion of the rate is not subject to control. To answer that the charges would be subject to regulation by the Secretary of Agriculture of course is the same as to contend that upon him is conferred concurrent regulatory power over the reasonableness of rates.

While the statutory purpose to maintain the Commission's authority to regulate all the components of the line-haul charge seems clear, it is not necessary for the purposes of this case to decide the full implication of Section 15 (5). The issue here is a narrow one. There is involved no question of the *quantum* of the charges for loading or unloading services; nor precisely where the transportation begins and ends. Neither is there any occasion to determine generally the status of stockyards organized and acting under different arrangements from those here presented. The single question is whether the appellant, in view of its particular status and of the service performed is bound to file its schedules of charges with the Commission.

II. The Commission's refusal to receive the proffered testimony was not arbitrary or otherwise erroneous.

At the hearings before the Commission held in Washington (before a commissioner and an examiner, R. 226 et. seq.), counsel for the Yard Company indicated that they expected to present evidence; with respect to the conditions and methods of operation prevailing at each of the 136 publicly posted stockyards in the United States; with respect to the similarity of the organization and operation of some of these companies to that of the appellant; that some of them had divested themselves of any railroad interest and had cancelled their loading and unloading tariffs without interference by the Commission; that most of them had filed no tariffs with the Secretary of Agriculture for loading or unloading service, although a few had, and these without challenge by the Commission. The announced purpose of the evidence was to show "contemporaneous interpretation of the Interstate Commerce Act and the Packers and Stock Yards Act" by the Commission in such a way as to force "the conclusion that this particular yard under a like interpretation of the statutes is no longer a common carrier by railroad". (R. 267, 269.) Counsel indicated willingness to have the matter of the admissibility of this class of testimony determined at that time, although the witness who proposed to give the testimony was not then presented. (R. 264-265.) The effect of the

ruling of the commissioner was that counsel could go as fully as desired into the situation at the yard in question and could make a matter of record any decision or action of the Commission determining the status under the act of a stockyard, but that it would not be permitted to prove the conditions and the operations generally at other yards or to show instances of other yards which had escaped regulation by the Commission with respect to the filing of tariffs because of mere nonaction by the Commission. (R. 271, 272, 273.)

It appears that upon this ruling counsel indicated a purpose to present for the record as an offer of proof the evidence of the witness in the specific form in which the witness would present it if allowed to testify. (R. 273) Objection was made and sustained to an offer of proof in this form, it being made clear, however, that counsel could make the offer in his own way disclosing the character and effect of the matters offered. These rulings were adhered to in the subsequent hearings (held at Chicago before an examiner, R. 274) when the disputed evidence was physically offered, at which time it was made plain that the "specific evidence" would be excluded but that an offer containing an adequate statement of the purport of the testimony would be received. (R. 376, 381, 389)

It is contended that in the refusal to receive this evidence and in the further refusal to permit the

Yard Company to make its offer of proof in the form insisted upon, the Yard Company has been denied a fair hearing to which it is concededly entitled under the act.

With respect to the matter of the offer of proof, an examination of the record as already referred to (See also R. 276, 380, 381, 385–391) indicates clearly that counsel was permitted upon the sustaining of any objection to state in his own way the substance of what the witness would testify to. The only effect of the ruling apparently was to prevent counsel putting into the record as an offer of proof the complete and specific testimony and other evidence which under the ruling had been excluded as immaterial and irrelevant. (R. 376)

The appellant was clearly entitled to no more. The principle referred to by appellant and the cases cited to the point that an offer of proof is required to be specific and complete are hardly apposite. Of course a party complaining of the exclusion of an answer to a question is bound to show either by the question itself, or by an offer of proof as to what the response would be, that the evidence to be elicited would be relevant and material. To this extent it is required that the offer be specific. But there is certainly no rule that the party either must, or is entitled to, show in his offer the complete and detailed evidence. This is recognized in *Buckstaff* v. *Russell & Company*, 151 U. S. 626.

The record here is entirely adequate as a basis for determining the relevancy and materiality of the excluded evidence and this is all that is necessary, so far as the offer of proof is concerned.

With respect to the relevancy and materiality of the evidence offered as to conditions and methods of organization and operations at other yards, it may again be emphasized that the issue before the Commission was a narrow one as to whether this particular stockyard is a common carrier subject to the act, required to file tariffs showing its loading and unloading charges. It seems clear that this question of jurisdiction hinges entirely upon what is done at this particular yard and upon the pertinent facts as to the company's organization, and cannot be determined upon the basis of what situations prevail at other locations. The determination of appellant's status was made upon such considerations in the *Union Stock Yard case, supra.* Similarly, in *Adams* v. *Mills, supra,* the question whether the unloading in the yards was a part of transportation was determined upon a consideration of special conditions prevailing at the appellant's plant, the Court there saying (p. 409):

> The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto.

It appears to be urged, however, that the evidence of conditions at the other yards was relevant as showing in some way an "administrative interpretation" that would govern in the present case. On the face of the record it appears that for more than 25 years the Commission has consistently dealt with the appellant as a common carrier subject to the act, and since 1922, upon the identical conditions as to lease arrangements and stock affiliation as now exist. Nothing in the proffered evidence therefore could tend to bring the appellant within the situation presented in *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, 288 U. S. 1, where this Court held that the long-continued treatment by the Commission of a particular carrier as not subject to certain provisions of the act was, in the special circumstances presented, entitled to great weight.

Nor can it be seen that the evidence, taken at its best, could tend to establish a rule of law as to the status of stockyards operating under conditions similar to those here presented. In the face of the long history of the present controversy, the several decisions of the Commission with respect to it and the litigation involved, the evidence could not in any circumstances tend to show a "long continued" or a uniform or "settled" administrative practice with respect to the status of such companies within the familiar rule governing the construction of "doubtful" statutes. *United*

States v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Company* v. *United States*, 282 U. S. 375, 378; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 190.

But more importantly it is clear that the proffered evidence did not go to any action of the Commission which purported to show a decision or ruling of the Commission with respect to any of these yards. Apparently the most that the evidence would have tended to show was that among the other stockyards of the country were some which, said to be organized and functioning similarly to appellant, had succeeded in cancelling their schedules for loading and unloading without protest by any interested party or any formal action or decision by the Commission. While it may be that nonaction in some circumstances may constitute a sufficient basis for applying the principle of settled administrative interpretation, it is earnestly urged that the application of such principles to evidence of the character here concerned would be most unfortunate and improper. The filing of a schedule with the Commission instituting or cancelling a tariff does not of itself require any determination by the Commission as to the lawfulness under the act of such schedule. In the absence of some protest or complaint or of some apparent cause for an investigation on the

Commission's own motion, such schedules are filed upon representations made by the publishing party as a matter of course so long as they meet the Commission's requirements as to form. The Commission's power under Section 15 (7) to suspend a schedule clearly does not imply a decision as to whether or not an unprotested schedule allowed to become effective is lawful. Especially in respect to questions of jurisdiction would it be unfortunate to decide each such question upon collateral issues going to the number of other carriers of similar kind which had escaped jurisdiction for whatever reason. The admission of such evidence would apparently result in a general survey, in each such case, of all other situations of a similar kind with the thought of giving weight in a sort of head-counting process to the number of carriers which had or had not, under such conditions, been brought under the Commission's jurisdiction.

It is also urged as indicating the relevancy of the excluded evidence that the appellant was entitled to show that the remedial purpose of section 15 (5) could be accomplished without subjecting any stockyard to regulation by the Commission as to its unloading and loading charges. This it proposed to show in part by proving that the carriers and many stockyards had harmoniously agreed upon these charges without occasioning any increase in the line-haul rates and without filing the schedules with any authority. The effect of this

argument, however, is only to assert that no one need have authority to regulate these charges and this is contrary to the appellant's own contention previously made that it is the Secretary of Agriculture who has such authority in all cases. Such evidence would have been competent before Congress in urging that no regulatory legislation was necessary in the first place. It seems hardly relevant as proof that Congress intended no one to regulate the charges. The appellant also proposed to support its premise in this respect by showing that other yards have included their unloading and loading charges in their schedules filed with the Secretary and, presumably, that the remedial purpose of section 15 (5) will be duly accomplished through his regulation of the charges. It does not follow, however, by reason of the inclusion of such charges in schedules filed with the Secretary that he has assumed to regulate them. The decision in *Denver Stock Yard Company* v. *United States, supra,* would appear to be conclusive of a contrary purpose. Moreover, the inclusion of such charges in schedules filed with the Secretary without some formal action by him approving this practice could hardly constitute a practical construction of the act by him in favor of his power of regulation; and certainly such inclusion would not be evidence of a practical construction of the act by the Commission.

But in any event, section 15 (5) clearly did not stop with the expression by Congress of a remedial purpose, leaving the manner of execution of the purpose for future determination; it provided at the same time a remedy, namely the inclusion of the charges as a part of the line-haul transportation for the purpose of regulation of the entire charge by the Commission. Until the Packers and Stock Yards Act was passed in 1921, there could of course be no contention that any other authority than the Commission was given jurisdiction over these charges, and the Packers and Stock Yards Act, as already shown, was carefully drawn not to overlap any jurisdiction previously conferred upon the Commission. In view of the plain terms of the statutes and of the decisions of this Court thereon, it could hardly be considered that there is involved any question of doubtful statutory construction in this respect justifying resort to a practical construction of the Act for its solution.

Appellant urges a number of other grounds for the reception of the excluded evidence, most of which, however, appear to go to the question of the necessity for any regulation by the Commission of these charges, or to the point that the charges are stockyard charges in character rather than transportation charges. These arguments on their face go more to the question of the desirability of the legislation than to the construction of the statutes. In this aspect the evidence would appear to be clearly irrelevant.

CONCLUSION

It is respectfully submitted that the decree of the lower court denying the prayer of and dismissing the bill should be affirmed.

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APPENDIX

Pertinent provisions of the Interstate Commerce Act

SEC. 1. [As amended June 29, 1906, April 13, 1908, June 18, 1910, May 29, 1917, August 10, 1917, February 28, 1920, June 19, 1934, and August 9, 1935.] [U. S. Code, title 49, sec. 1.]

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.

(3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property desig-

nated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regula-

fions which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

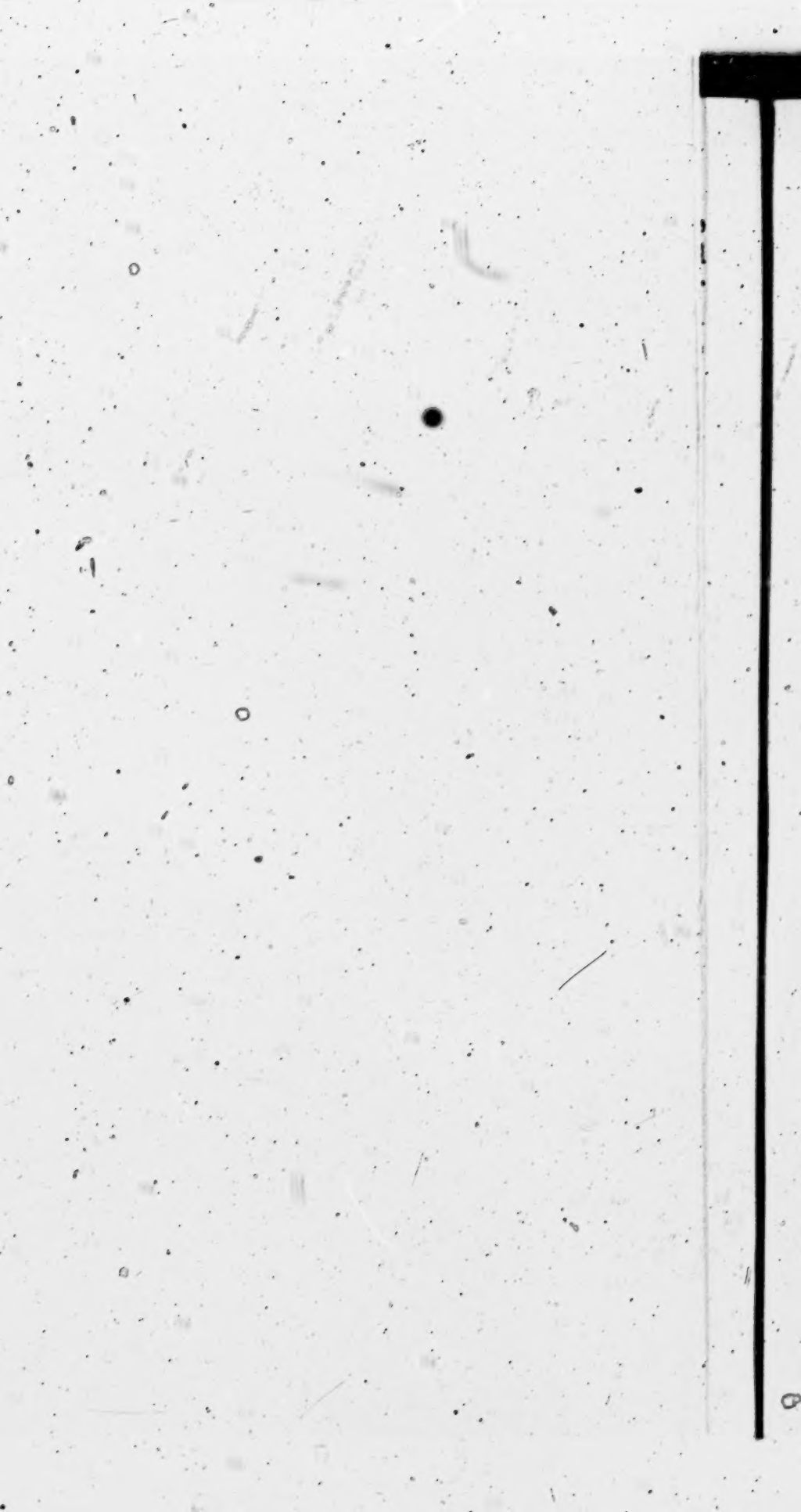
(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 15. (5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon

the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 40

UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF RAILROAD INTERVENORS.

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UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

BRIEF OF RAILROAD INTERVENORS.

OPINIONS BELOW.

The decision of the District Court is unreported. The decision and opinion of the Interstate Commerce Commission is reported in *Cancellation of Livestock Services at Chicago*, 227 I. C. C. 716 (July 11, 1938).

JURISDICTION.

Final decree of the Court below dismissing appellant's bill of complaint was entered on March 9, 1939 (R. 119), and appeal allowed on April 7, 1939. (R. 154) The jurisdiction of this Court has been invoked under Section 210 and Section 238(4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938. (28 U. S. C. A., Secs. 47a and 345.) Probable jurisdiction was noted by this Court on May 22, 1939.

Statement.

These intervenors are the trunk-line railroads which transport more than eighty-five percent of all the livestock moving to and from the public stockyards of Chicago.[1]

Appellant, Union Stock Yard and Transit Company, was organized in 1865 under a special charter from the State of Illinois, which granted it the power to build, own and operate a railroad and a stockyard and the power of eminent domain. (R. 645-647) Under this authority, the company acquired the necessary real estate for a public stockyard, and approximately 300 miles of railroad tracks consisting of main lines, connecting with trunk lines entering Chicago and switches to adjacent industries. (R. 29) Since 1897, as contemplated and authorized by its charter, the tracks of the Yard Company have at all times been operated under various leases by other carriers. (R. 29) The trunk-line railroads which perform the line-haul service have always moved the livestock with their own power to and from appellant's chutes and chute pens at the public stockyards. Throughout the entire period of its existence, there has been no change of any character in the services performed by the Yard and Transit Company in connection with the transportation of the livestock to and from the yard. The Yard and Transit Company has at all times performed the terminal services necessary to

[1] Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

the delivery of the stock consigned to the yards, and to the acceptance and loading of outbound shipments originating at the yard. It has at all times owned and operated the facilities employed in this service. (R. 29) It "not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself." (R. 36, 283-285, 341)

While these services are, for convenience, referred to as the loading and unloading services, the services of actually loading and unloading the livestock are only part of a group of services performed by the Yard Company in connection with the transportation of each shipment of livestock to and from the yard. These services, in which there has never been any change, were succinctly described by the Interstate Commerce Commission in an early report from which the following is quoted:

> "The services it renders in connection with shipments of live stock to and from the stockyards are reported to be as follows:
>
> "(a) The service of guaranteeing the railroad companies against loss arising out of the delivery of live stock without the surrendering of the bill of lading.
>
> "(b) The service of guaranteeing freight charges.
>
> "(c) The service of loading and unloading the freight.
>
> "(d) The service of notifying the consignees.
>
> "(e) The service of correctly tabulating the car numbers and contents of the car.
>
> "(f) The service of furnishing the weights to the carriers.
>
> "(g) The service of maintaining records as to dead and crippled animals and of maintaining records showing deliveries to 'billed consignees.'
>
> "(h) The service of furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago."
>
> *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 213-214 (1919).

The services now being performed by the appellant are the same as those itemized by the Commission. (R. 248, 250, 258-259, 576-599)

One detail of appellant's service should be brought to the particular attention of the Court. The Yard and Transit Company determines at what chutes and pens the livestock shall be loaded and unloaded. By so doing it designates the tracks over which the inbound and outbound cars move to and from the chutes and pens. *To this extent the Yard and Transit Company controls train movements to and from this terminal.*[1]

The public stockyards at Chicago which is owned and operated by appellant is the largest livestock market in the world. Livestock moving to this market by railroad must be taken from the car and placed in the yard by the appellant because the necessary unloading facilities are owned and operated exclusively by it. Through appellant's control of the terminal facilities at the yard, it has a complete monopoly of a service which is an essential part of the rail movement of this great stream of interstate commerce. The District Court made the following finding of

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[1] *Inbound Shipments:* The livestock superintendent of the appellant in charge of the receiving office is advised when a train of livestock arrives at the terminal "and gives information as to which platform train will be unloaded" and "when the train arrives at the platform designated, the crew under the direction of the platform foreman immediately starts to work." (R. 576, 577)

Outbound Shipments: The appellant owns and maintains ten loading platforms at which outbound shipments are loaded. After the appellant has assigned to the trunk-line carrier which is to handle the outbound movement a particular loading platform, the loading foreman of the appellant and a joint agent of the railroads "decide at which chutes the respective cars should be placed for loading and this information is then conveyed to the Road Haul Switching Foreman." (R. 594, 595)

fact which is not contested by appellant: "The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff." (R. 118)

In *United States* v. *Union Stock Yard and Transit Company*, 226 U. S. 286, decided in 1912, this Court found the appellant Yard and Transit Company to be a common carrier by railroad in respect to the loading and unloading service at this yard, and ordered it to publish and to file with the Interstate Commerce Commission [1] its tariff, stating its charges therefor. Except for a short period, (*Live Stock Loading and Unloading Charges*, 52 I. C. C. 209), the required tariff has been on file ever since.

In 1935, for the purpose of tripling its charges for the terminal service performed by it, without permitting the Commission to pass upon the reasonableness of the increase (R. 311), the Yard and Transit Company filed a supplement to its tariff which contained the notice that no tariffs of the Company would thereafter be filed with the Interstate Commerce Commission.

The Commission suspended the operation of that supplement, and after full hearing, refused to permit the withdrawal of the tariff, holding again, as the Commission and this Court had repeatedly held, that the Yard and Transit Company is a common carrier by railroad subject to the provisions of the Act. (R.28) A petition for rehearing and reconsideration was denied. To comply therewith appellant vacated its cancellation notice as required by the Commission's order, and thereupon refiled it. The Commission again suspended the operation of the notice, and after a second hearing again refused to permit the withdrawal of the tariff. Appellant then brought suit in the

[1] The Interstate Commerce Commission is hereafter generally referred to as the Commission and the Interstate Commerce Act as the Act.

District Court to set aside the Commission's order vacating the cancellation notice. This is an appeal from the unanimous decision of the District Court sustaining the order of the Commission.

THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT.

All parties to the proceeding submitted their respective proposed findings to the court. The court drew its own findings, not adopting any of those submitted by the parties. Thereafter, all of the parties asked the court to amend its findings, but the court made no change whatsoever therein. Appellant refers particularly to the court's finding of fact No. 5, which reads as follows (R. 118):

> "5. Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

It is clear from other findings of the court, namely, findings of fact Nos. 8, 9, 11 and 12, and the court's conclusions of law, particularly Nos. 2 and 3, that by its finding No. 5 the court means that since May 5, 1923, neither the plaintiff nor the Chicago Junction Railway Company has engaged in the operation of locomotives over railroad tracks. The court's findings of fact Nos. 8, 9, 11 and 12 are as follows (R. 118):

> "8. Plaintiff is and was at the time of the hearing by the Interstate Commerce Commission, and when the Interstate Commerce Commission made its order, a common carrier within the meaning of the Interstate Commerce Act.
>
> "9. The court finds that the services covered by the order of the Commission which are complained of, were interstate transportation services within the meaning of the Interstate Commerce Act."
>
> * * * * * *
>
> "11. The court finds that the unloading of the stock and driving of them to the pens in the Stock Yards constitute interstate transportation services

which are subject to the regulation of the Interstate Commerce Commission.

"12. The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff."

The court's conclusions of law Nos. 2 and 3 are as follows (R. 119):

"2. The plaintiff is a common carrier and subject to the regulation of the Interstate Commerce Commission.

"3. The plaintiff is engaged in the transportation by railroad of livestock in Interstate Commerce and the services it renders in unloading the livestock from the cars and delivering them to the pens in the Stock Yards are interstate transportation services and subject to the regulation and control of the Interstate Commerce Commission."

SUMMARY OF ARGUMENT.

I.

The loading and unloading of the livestock is a terminal service which is necessary to complete the transportation of this traffic by railroad from and to the public stockyards at Chicago. Appellant alone can perform the service. In the performance of this service appellant is engaged in the "transportation" of livestock "by railroad" as those terms are defined in the Act. It holds itself out to perform this transportation for all alike, for a common charge, and under circumstances which make its business a public calling. It is, therefore, a common carrier engaged in the transportation of livestock by railroad.

Jurisdiction of the Commission over appellant is necessary to carry out the legislative intent and the remedial purposes which Section 15(5), and the statute as a whole, were drawn to effectuate.

II.

In three decisions,[1] the last in 1935, this Court has held appellant to be subject to the Act, and in a fourth decision rendered in 1938[2] the Court held the loading and unloading of livestock at public stockyards to be subject to the jurisdiction of the Commission and not to that of the Secretary of Agriculture.

---

[1] *United States* v. *Union Stock Yard and Transit Co.*, 226 U. S. 286 (1912);
Adams v. *Mills*, 286 U. S. 397 (1932);
A. T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193 (1935).

[2] *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470 (1938).

Following the 1912 decision of this Court requiring appellant to file a tariff with the Commission, under Section 6 of the Act, stating its charges for the loading and unloading service, the courts have held many terminal companies, not owning or operating motive power, to be common carriers by railroad.

III.

The Secretary of Agriculture does not have jurisdiction of the loading and unloading services performed by appellant.

Appellant is subject to the jurisdiction of the Commission under the terms of the Interstate Commerce Act, and the Packers and Stockyards Act provides that nothing therein shall affect the jurisdiction of the Commission *over stockyard companies.* The only jurisdiction of the Commission to which this provision could have referred is the jurisdiction of the Commission over stockyards in respect to the loading and unloading service performed by them.

The Commission, over a period of many years, the Secretary by formal decision, and this Court,[1] have all held that the loading and unloading service is subject to the exclusive jurisdiction of the Interstate Commerce Commission and is not subject to the jurisdiction of the Secretary.

Appellant's construction of the statute would involve a dual jurisdiction by the Commission and the Secretary over the terminal service of appellant which would inevitably produce administrative conflict and confusion.

The theory that the Commission could exercise jurisdiction over the service which the shippers are entitled to receive under the Interstate Commerce Act, while the Sec-

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[1] *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470 (1938).

retary would exercise jurisdiction over the service which the appellant is required to furnish under the Packers and Stockyards Act, is untenable on its face and cannot survive any effort to envisage its practical application.

To remove the delivery service performed by appellant from the jurisdiction of the Commission would leave that service unregulated and so disrupt a complete system of federal regulation at a vital point.

IV.

This Court has specifically held[1] that the status of appellant under the Act is unaffected by any consideration of whether or not it performs this terminal service on livestock as agent of the trunk-line railroads.

V.

The appellant has twice been accorded a full and fair hearing by the Commission.

---

[1] *Adams* v. *Mills*, 286 U. S. 397, 415 (1932).

ARGUMENT.

I.

THE APPELLANT IS SUBJECTED TO THE JURISDICTION OF THE COMMISSION BY THE EXPRESS TERMS OF THE INTERSTATE COMMERCE ACT.

The appellant's service of loading and unloading livestock moving to and from the public stockyards at Chicago is an integral part of the complete transportation service. The Interstate Commerce Act denominates the loading and unloading service as railroad transportation. It does so by general terms and definitions in Section 1(3) of the Act, and in specific words in Section 15(5) of the Act.

The terms of the statute and the physical conditions at the yard thus unite to give the appellant a monopoly in the performance of the terminal service which is necessary to complete the transportation of the livestock to and from the Chicago market. The appellant holds itself out to perform this transportation service for all alike, for a common charge, and has done so for 70 years. The single question presented by the appeal, therefore, is whether this essential transportation service is performed by the appellant as a common carrier and subject, as such, to the provisions of the Act, or is performed in a strictly private capacity and, therefore, not subject to the provisions of the Act.

In three cases, this Court has held the appellant to be a common carrier by railroad subject to the regulation of the Interstate Commerce Commission in respect to the loading and unloading services performed by it. Independently of this controlling authority, the plain terms of the Interstate Commerce Act invest the Commission with jurisdiction over the appellant.

A. APPELLANT IS A COMMON CARRIER ENGAGED IN TRANSPORTATION BY RAILROAD UNDER THE TERMS OF SECTION 1 OF THE ACT.

Section 1(1) of the Interstate Commerce Act provides:

> "The provisions of this part shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, * * *." (49 U. S. C. Sec. 1(1).)

Under the express definitions of the Act, the Yard and Transit Company engages in the "transportation" of livestock "by railroad" as a "common carrier for hire."

By the terms of Section 1 (3) "railroad" is defined as follows:

> "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." (49 U. S. C. Sec. 1 (3).)

The loading and unloading facilities owned and operated by the appellant are "terminals, and terminal facilities" within the meaning of that section, which are both "used" and "necessary in the transportation" of the livestock.

In its report in this case, the Commission states:

> "In *Live Stock Loading and Unloading Charges, supra,* we held respondent to be, in effect, the terminal of the line-haul carriers and that conclusion was upheld by the Supreme Court in *Adams* v. *Mills, supra,* page 409." (R. 40.)

This Court, in *Adams* v. *Mills,* 286 U. S. 397 (1932), referred to in the quotation above, affirmed a decision of

the Commission to the effect that the action of the Yard and Transit Company in making an extra charge against the shippers of 25 cents per car for the loading and unloading services constituted an unlawful practice under the Interstate Commerce Act. The Court said:

> "The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. That the Yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so." (p. 409.)

Thus it is clear that the Yard and Transit Company operates terminals and terminal facilities which are within the definition of "railroad" under the Act. The same conclusion follows from the fact that the grounds upon which those facilities are located, and which are also owned and operated by the appellant, are "grounds, used or necessary in the transportation or delivery" of the livestock consigned to the Union Stock Yards at Chicago.

In addition to the definition of "railroad," Section 1(3) contains the following definition of "transportation," which expressly includes the services performed by the Yard and Transit Company in connection with its railroad:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (49 U. S. C. Sec. 1 (3).)

Loading and unloading facilities are included within the statutory term "all instrumentalities and facilities of shipment or carriage" and are therefore defined by the statute as transportation facilities. The Yard and Transit Company performs the services on inbound shipments of unloading the animals into pens for delivery at the stockyards and on outbound shipments of loading the animals from the pens into the cars. By reason of its dominant physical situation the Yard and Transit Company has an absolute monopoly of a service necessary to the completion of the required transportation service at the Chicago public stockyards. As one of its findings of fact, the District Court found that "there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff." (R. 118.) The appellant does not contest this fact. Within the express definition of the statute, these are also "services in connection with the receipt, delivery • • • and handling of property transported," and are therefore transportation services.

In the operation of its railroad and the performance by it of the necessary transportation services, the Yard and Transit Company controls the bottleneck through which must pass every head of livestock moving to or from the public market at Chicago by rail. Appellant performs these services as a public utility. It holds itself out to the public to provide the terminal facilities and the loading and unloading services on all shipments consigned to those yards for a common charge, and therefore, engages in the transportation of property by railroad as a common carrier for hire and not in a private capacity. Under these circumstances, appellant falls directly within the terms of the statutory definition of common carrier, which is as follows:

"The term 'common carrier' as used in this part

shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." (49 U. S. C. Sec. 1 (3).)

In respect to the appellant's status as a common carrier engaged in the transportation of property by railroad, the Commission made the following findings of fact:

"These services consisted and consist today of the unloading of livestock from railroad cars into unloading pens located on respondent's property and of the loading of livestock from loading pens into railroad cars. Such services have always been performed by respondent's employees, and under respondent's rules the services cannot be performed by persons who are not employed by respondent. The livestock is now, and, except for a period early in respondent's history, always has been, hauled by the trunk lines to the platforms where respondent furnishes the services and facilities to complete the transportation." (R. 34.)

* * * * *

"The unloading and loading of livestock at respondent's yards and the furnishing of the facilities is an inseparable part of the interstate railroad transportation. Respondent not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery Having attained this status, and thereby having rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common-carrier functions to another corporation." (R. 36.)

* * * * * *

"In the contemplation of its charter it is still engaged in the 'public callings' of operating public stockyards and a railroad as an adjunct thereto. In *Live Stock Loading and Unloading Charges, supra*, we held respondent to be, in effect, the terminal of the line-haul carriers and that conclusion was upheld by the Supreme Court in *Adams* v. *Mills, supra*, page 409. Respondent not only holds itself out to perform the 'transportation' in question, constantly acting in that capacity, but insists upon doing so." (R. 40.)

"Under the conditions existing at Chicago, respondent's yards are substantially the sole terminal in Chicago for the receipt of livestock and, as to the unloading of shipments destined to the yards, the railroads have to employ respondent to perform the service. Consequently the freedom of bargaining commonly entering into the creation of the usual relationship of principal and agent is not possible. Respondent is agent of the line-haul carriers' precisely as is a switching carrier completing delivery for a line-haul carrier because it, too, is a common carrier whose charges are subject to regulation.

"We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago." (R. 42.)

On these facts the Commission rightly held that plaintiff performs these transportation services as a common carrier and not in a private capacity.

B. THE RELEASE OF APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DEFEAT THE REMEDIAL PURPOSE OF SECTION 15 (5) OF THE ACT.

It is not necessary here to rely solely upon the comprehensive character of Section 1 in order to show the Congressional intent to vest the Commission with the power to regulate appellant's transportation activities. A

specific section of the Act, Section 15(5), was enacted in 1920 at the insistence of the very shippers who would now be injured if appellant should succeed in its purpose to free itself from the jurisdiction of the Commission in order to accomplish a large increase in its loading and unloading charges. (R. 311.) That section reads as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefore to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." (49 U. S. C. Sec. 15(5).)

The history of the enactment of that section shows that its purpose was to vest the Commission with power to regulate the appellant's services of loading and unloading and its charges therefor. These facts were correctly stated by the Commission in its report in this case, as follows:

> "*The enactment of this paragraph* [Sec. 15(5)] *resulted from respondent's action in 1917* in increasing its unloading charge and the refusal of the line-haul carriers to absorb the increase, with the result that the additional charges imposed by respondent were collected from the consignees. The practices of carriers and stockyards of adding terminal charges to the scheduled railroad rates had been bitterly

complained of by livestock shippers, and prior to the enactment of the above paragraph Congress was fully informed of the status of public stockyards and the services which they performed. Senator Cummins, Chairman of the Interstate Commerce Committee, stated that the purpose of the amendment was to require that the series of services rendered in connection with the transportation be performed for a single scheduled rate, and when the conference report on the bill in its final form was made, the House managers stated that the purpose of the amendment was to provide that the through rates on livestock should include unloading and other incidental charges. *The legislative history of the paragraph indicates clearly the single purpose to give the Commission authority over services rendered and facilities used in the delivery of livestock at public stockyards.*" (R. 37; italics ours.)

"Since respondent performs the service as common carriage, there is no reason, from a legal standpoint, why, as so performed, Congress' declaration that it is part of the railroad transportation should not still be given effect. There is a great deal of reason for so doing from the standpoint of giving full effect to the remedial purpose of section 15(5)" (R. 38).

As the Commission has found, it was solely the action of this appellant which caused the enactment of Section 15(5). In every substantial respect its course of action now is the same course of action which produced that legislation. Then, as now, it was seeking to escape from the regulation of the Commission in order to increase its charges. Appellant filed a tariff with the Commission in 1917 stating its proposed increased charges, but the various national associations of livestock shippers opposed the increase and the operation of the tariff was suspended. *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919). Pending the decision on the proposed increase, appellant filed a tariff effective September 7, 1917, cancelling its tariffs with the Commission, just as it has

done in this case. Although it had been held by this Court in 1912 to be a common carrier subject to the Act, appellant contended, as it does again here, that its status had been altered by changes in the lease of certain facilities, which, however, like the 1922 lease here relied upon, did not include the loading and unloading facilities. The shippers protested the withdrawal of the appellant's tariff just as they do here, and the Commission suspended its operation. The cancellation notice became effective, nevertheless, because the Commission's power to suspend that action was and is limited by the Act, Section 15(7), and the necessary hearings could not be completed within the prescribed period. Having succeeded in this manner in withdrawing its tariffs from the Commission, the appellant, then as now having a monopoly of the terminal services and possession of the livestock, simply collected the increased charges from the shippers. The Commission's decision on further hearing again held appellant to be a common carrier, and required it to pay reparations to the shippers in the amount of the increased charges so collected by appellant without the sanction of the Commission. This decision was not rendered until July 15, 1920. *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164. The award of reparations[1] against the Yard and Transit Company was later sustained by this Court on the ground that the collection by that company of the increased charge against the shippers constituted an unreasonable practice under the provisions of the Interstate Commerce Act. *Adams* v. *Mills*, 286 U. S. 397 (1932). Appellant paid the award.

But in the meantime, prior to the Commission's decision, and long before the matter in dispute was authoritatively put to rest by this Court in *Adams* v. *Mills*, *supra*, the appellant had forced the livestock shippers to pay increased charges not on file with the Commission, and was firmly

[1] Section 16 of the Act authorizes awards of reparation against common carriers only.

maintaining, just as it is here, that it was no longer subject to the Interstate Commerce Act. Faced with this situation, early in the year 1920, the various national associations of livestock shippers, while pursuing their remedies before the Commission, urged the enactment of Section 15(5) with a purpose to establish beyond possible controversy the jurisdiction of the Commission over the whole subject of loading and unloading at public stockyards and the charges therefor. Senator Cummins, co-author of the bill and Chairman of the Committee which reported it, stated, in part, as follows:

> "Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.
>
> • • • • •
>
> "I am entirely in sympathy with the purpose of these shippers and want to bring the whole subject within the jurisdiction o the Interstate Commerce Commission • • •." (Cong. Rec. Vol. 59, p. 674.)

The purpose of Section 15(5) to place the whole subject of the loading and unloading services and charges under the regulation of the Commission for the protection of the shipper against the very action which appellant seeks here to repeat, is thus established by the history of that legislation.

This Court itself has recognized the direct relationship between the enactment of paragraph (5) of Section 15 and the controversy between the appellant and the shippers, culminating in the decision in *Adams* v. *Mills, supra.* It has recognized that that section of the Interstate Commerce Act and the provisions of the Packers and Stockyards Act, enacted a year later, must be read in the light of that controversy. In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193 (1935), the Court said:

> "Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the

controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock received. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. * * * Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission." (pp. 199-200.)

Appellant asserts again and again in its brief (pp. 9, 39) that the shippers do not pay the appellant's charges. But the shippers know that they do. Their conviction of that fact is attested by the presence before the Commission in this proceeding of every large livestock association in the West, vigorously opposing appellant's effort to free its charges of regulation by the Commission. (R. 571.) With like disregard of the realities appellant argues that in causing the enactment of Section 15(5) the shippers intended that the loading and unloading services and charges should be unregulated. (Appellant's Brief, p. 63.) The shippers were engaged in a bitter fight against the collection of the increased and unauthorized charge by the appellant and the contention of that company that it was no longer subject to regulation. This provision of the law had its origin in the insistence of the shippers that appellant must be subject to regulation by the Commission. The shippers understand perfectly that the loading and unloading services must be compensated for out of the line-haul rate which they pay, and that increases in the charges for these services must eventually be reflected in a higher line-haul rate. It is solely for that reason that the shippers secured the enactment of Section 15(5) and have been active in this proceeding with a purpose to prevent the nullification of that legislation.

C. TO HOLD THE APPELLANT NOT SUBJECT TO THE ACT WOULD DEFEAT THE INTENT OF THE STATUTE TO PROVIDE MEANS TO COMPEL THE PERFORMANCE OF A VITAL TRANSPORTATION SERVICE WHICH IS AND CAN BE SUPPLIED ONLY BY THE APPELLANT.

In the interpretation and application of the Interstate Commerce Act, the courts have constantly kept before them its intent, and to the full extent possible under the terms of the statute, have been at pains to give effect to that intent. Here, likewise, in interpreting the Act to determine its application to the plaintiff, the Court should have before it facts which show that the release of the appellant from the jurisdiction of the Commission would defeat the legislative intent and the remedial purposes which the statute was drawn to effectuate.

In interpreting the intent of Congress which underlies Sections 1 and 15(5) of the Act, it must be borne in mind that when these provisions of the law were enacted the Packers and Stockyards Act was not in existence. If the appellant was not made subject to the Interstate Commerce Act in respect to its loading and unloading services, it must be found that Congress intended at that time that those services and the charges therefor should be unregulated.

In view of the fact that the appellant is, within the statutory definitions of the Act, engaged in the "transportation" of livestock by "railroad" "as a common carrier for hire" it would require strong proof to make a showing that in enacting the general terms of Section 1 and the specific terms of Section 15(5), Congress intended to withhold from the Commission jurisdiction over the appellant's transportation services and charges. No such showing can be made. On the contrary, an examination of other portions of the Act itself shows that regulation of the appellant by the Commission is necessary to effectuate the purposes of the Act.

Two of the fundamental purposes of the Act are given expression in its first section. The first, always a primary step in the process of regulation, is that means shall exist under the Act to compel the performance of the necessary public service (Sec. 1(4)); the second is to provide that the charge for the service shall be reasonable.

In its first section, the Act provides:

> "It shall be the duty of every common carrier, subject to this part, engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor • • •". (49 U. S. C. Sec. 1(4).)

We ask the Court to consider whether the legislative intent which underlies this provision would be effectuated or defeated by holding appellant not subject to this requirement.

The loading and unloading service performed by appellant is a vital terminal service which is an indispensable part of the transportation of livestock to and from the public stockyards at Chicago. The public stockyards at Chicago, which is located upon the premises of the appellant, is the largest livestock market in the world. Since 1880, the receipts at this market have ranged between eight and eighteen million head per annum, and the annual movement by rail from 100,000 to 300,000 cars. (R. 733-735.) The shippers of livestock have the right under the Interstate Commerce Act to consign their livestock to that market, and the trunk-line railroads have no choice but to carry it there. But the trunk-line railroads which transport the livestock to and from the yards are themselves powerless to complete the transportation by making the delivery required by Sections 1(3) and 15(5). The extensive facilities used in and necessary to the delivery and receipt of the great stream of commerce moving to and from the Chicago market are owned by the appellant. Ap-

pellant insists upon operating these facilities itself. It will not permit the trunk-line railroads to enter upon its premises for the purpose of accomplishing the delivery or receipt of the stock. (R. 36, 283-285.)

The dominant physical position of the Yard and Transit Company gives it a monopoly in the handling of this traffic so complete that no livestock can be transported to or from the public stockyards at Chicago without paying toll to the appellant. Congress did not intend to leave performance of this vital transportation to the choice of those who own and operate the instrumentalities necessary to its performance. It cannot be doubted that when Congress declared, both in general terms (Sec. 1(3)), and in specific terms (Sec. 15(5)) that transportation wholly by railroad shall include delivery to the livestock at public stockyards, it intended to give the Commission power to compel the performance of the service necessary to complete the transportation of the livestock.

The trunk lines can neither perform the required delivery services themselves, nor can they compel the Yard and Transit Company to perform those services. The jurisdiction and control of the trunk-line carriers, to which counsel for appellant would limit the Commission does not, therefore, give jurisdiction and control of the delivery service which must be performed by the appellant. Unless there is direct jurisdiction of appellant under the Act, appellant has an absolute veto power over the great movement of livestock to and from the public stockyards at Chicago. To leave the performance of this vital delivery service to the choice of the appellant by relieving it from the jurisdiction of the Commission would defeat the clear intent of Congress, Section 1(4), that power shall exist under the Act to compel the performance of necessary railroad transportation upon request therefor.

D. TO RELEASE APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DEFEAT THE INTENT OF CONGRESS TO SUBJECT THE CHARGES FOR RAILROAD TRANSPORTATION TO THE CONTROL OF THE COMMISSION.

The second of the fundamental purposes of the Act which have expression in its first section is found in the following declaration:

> "All charges made for any service * * * rendered in the transportation of passengers or property * * * as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared to be unlawful." (Sec. 1 (5).)

We ask the Court to consider here whether the intent of the Congress which underlies that provision of the Act would be effectuated or defeated by the removal of the appellant and the control of its charges, from the jurisdiction of the Commission. In its report in this proceeding, the Commission states:

> "The fact that the railroads must proffer the (delivery) service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable. If respondent doubles its present charge of $1.25 it must still be absorbed. Either the railroads must bear the increase or pass it on to the shippers in an increased through rate." (R. 38.)

In discussing the effect of a doubling of appellant's charge for the delivery service performed by it, the Commission was not indulging in idle speculation. In recent years, appellant, proceeding under the processes of the Act as a common carrier, has secured large increases in its charge for the delivery services performed by it. The result, as the Commission states herein, is that appellant's present tariff charge for this unloading service is five times the charge imposed for the same service approximately twenty years ago. (R. 40, 41, 342; see also

Livestock to or From Union Stock Yards, Chicago, 222 I. C. C. 765 (1937).)[1]

Despite these drastic increases, the Vice President and General Manager of the Yard and Transit Company testified under questioning by the Commission's Examiner that the real purpose of the appellant behind its effort to escape the jurisdiction of the Commission is now to establish a charge more than three times the present basis which it secured by filing its tariffs as a common carrier under the Act. We quote from the record as follows:

> "Exam. Carter: *Has it been the purpose of the Stock Yards Company since sometime prior to the date on which it filed these tariffs in Docket 4109 to increase its charges for this particular service $3 per car? Has not that been the purpose, or one of the purposes at least* of the Stock Yards Company in the various matters that it has undertaken to accomplish, that is, by the contracts, and by joint arrangements with the Stock Yards Company, and by filing the tariff with the Secretary of Agriculture and by *the withdrawal of the tariffs from the files of the Commission?*
>
> "Witness Henkle: I think that is a correct interpretation of our endeavor." (R. 311).

This witness then testified further as follows:

> "Exam. Carter: Did you ever give consideration, Mr. Henkle to attempting to justify an increase in the charge, of $3 per car, before the Commission?
>
> "Witness Henkle: No, sir, not before the Commission.
>
> "Exam. Carter: I know you never attempted to

[1]In the case cited which was pending before the Commission contemporaneously with the instant proceeding, the action taken by appellant was based upon its status as a common carrier subject to the Act. *We respectfully commend the Commission's report therein to the particular attention of the court.* It emphasizes the fact established by this record, that appellant is interested in the question here before the court, only because of its bearing upon appellant's effort to make an increase in its charges which it is unwilling to submit to the Commission.

justify it before the Commission, but I mean, have you given consideration to making an effort to justify an increase of $3 before the Commission? In other words, in the previous proceeding when you wanted to increase the charge from 50 cents to 75 cents and from 75 cents to $1.25 and so forth, you brought proceedings before the Commission to accomplish that, did you not?

"Witness Henkle: Yes, sir.

"Exam. Carter: And that went along for a number of years, did it not?

"Witness Henkle: Yes, sir.

"Exam. Carter: Now, this may not be relevant either to the issues, but why is it you did not continue with that procedure?

"Witness Henkle: Well, the various plans that we have undertaken and developed in connection with getting increased rates have been the subject of discision with our attorneys and they have been the ones that have finally decided in which direction we should endeavor to secure increased revenue." (R. 311, 312.)

The increases which it has made in recent years have been so great that appellant has not deemed it expedient to go again before the Commission as it has so frequently in the past, and seek to justify a further increase in its charge. Rather, it has tried to employ a number of "devices" (the word used by the Commission) which were designed to enable it further to increase its charge without submitting the reasonableness of the higher charge to the Commission. In the decision referred to above, rendered by the Commission during the progress of this proceeding (in which the appellant was seeking through another device to triple its rates without permitting the Commission to pass upon the reasonableness of the higher charge) the Commission said:

"We have referred to the unusual methods selected by the yards company since 1934 to increase the compensation it receives from the trunk lines for the performance of the loading and unloading services, and

> we have called attention to the fact that *the objective of the yards company in the selection of these methods is to be relieved from any supervision of the charges it seeks to exact from the trunk lines.* • • •" (*Livestock to or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 773 (1937).)

Appellant's present per-car charges for the loading and unloading charges are approximately five times those in effect only 20 years ago and it now seeks to defeat the jurisdiction of the Commission so that relieved of regulation it may immediately triple the present charges. After discussing the other "devices" employed by appellant to increase its charges, the Commission referred to the position of appellant in the instant proceedings as follows:

> "The next step taken by the yards company *to increase its charges* for loading and unloading livestock *was an attempt to eliminate itself from any regulation by us.* This attempt assumed the form of a supplement to its existing tariff on file with us in which it was stated that the yards company would not file tariffs with us." *Livestock to or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 769 (1937).

The utility before the Court is seeking to escape regulation in order to effect increases in its charges which it knows it cannot justify under regulation. Section 1 of the Act provides that "all charges for the transportation of property shall be just and reasonable." The power and duty "to determine and prescribe what will be the just and reasonable • • • charge" is committed to the Commission by Section 15 (1) of the Act. It is clear that the intent underlying these provisions of the Act would be frustrated by the release of appellant from the jurisdiction of the Commission.

E. CONGRESS HAS APPROVED THE CONSTRUCTION WHICH THIS COURT PUT UPON THE ACT IN HOLDING APPELLANT TO BE SUBJECT THERETO.

The appellant has cited certain legislative history in attempting to avoid the express provisions of Section 1(3) of the Interstate Commerce Act defining the appellant's loading and unloading facilities as a "railroad" and its services as "transportation" services. (Appellant's Brief, pp. 51-59.) To do so, it has gone back to the enactment of certain amendments to the Act in 1906, making extensive quotations from the Commission's Annual Reports preceding those amendments and from the Congressional Reports. These quotations, however, deal only with the furnishing of refrigeration and cars to the railroads under private contracts which the railroads are free to make or not, as they please. The trunk-line carriers have no such freedom of choice with respect to the facilities and services furnished by the Yard and Transit Company. They are compelled to transport livestock for delivery at the public stockyards, yet the stockyard companies have an absolute monopoly over the completion of the required transportation services.

Appellant does not deny that by the very words of Section 1(3), the terminal facilities owned and operated by the appellant constitute a railroad and that its services in connection with those facilities constitute transportation by railroad. Six years after the enactment of the Hepburn amendment, which appellant now seeks to construe as not applying to stockyards companies, the Supreme Court held that the comprehensive provisions of Section 1(3) as amended in 1906 did apply to the Yard and Transit Company and it quoted those provisions as authority for its holding that the Yard and Transit Company was a common carrier engaged in transportation and subject as

such to the jurisdiction of the Interstate Commerce Commission. *United States* v. *Union Stock Yard and Transit Company*, 226 U. S. 286, 303-304 (1912). Thus, appellant's attempted restriction of the meaning of those provisions has long ago been rejected by this Court itself.

Furthermore, after the Yard and Transit Company had been held by both this Court and the Commission to be a common carrier subject to the Act, the definition of "common carrier" was not restricted but was expanded in 1920 to include the provision that "the term 'common carrier' as used in this part shall include * * * all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." Section 1(3). As the appellant has stated, where an act has been judicially construed and is subsequently amended without changing the terms construed, it should be presumed that Congress approved of the previous construction. (See Appellant's Brief, pp. 57-58.) That principle applies with full force to this case, since the definitions of "railroad", of "transportation" and of "common carrier", which previously had been held to apply to appellant, were not restricted in their application by the comprehensive amendments of the Transportation Act, 1920. In fact, as has been noted, the definition of common carrier was expanded, and by the addition of Section 15(5) the services of loading and unloading at public stockyards were expressly included within transportation in order to deal explicitly with the Yard and Transit Company's insistence at that time that it was no longer subject to the jurisdiction of the Commission. Later, by the incorporation of Section 406 in the Packers and Stockyards Act[1]

[1] "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission." (7 U. S. C. Sec. 226.)

Congress took pains to preserve the Commission's jurisdiction over the loading and unloading service. (See pp. 52, 53, this brief.)

II.

THE STATUS OF APPELLANT AS A COMMON CARRIER BY RAILROAD SUBJECT TO THE INTERSTATE COMMERCE ACT IS ESTABLISHED BY THE DECISIONS OF THIS COURT.

The following decisions of this Court establish the status of appellant as a common carrier by railroad, subject as such to the Interstate Commerce Act:

United States v. *Union Stock Yard and Transit Co.*, 226 U. S. 286 (1912);

Adams v. *Mills*, 286 U. S. 397 (1932);

A. T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193 (1935);

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470 (1938).

A. THE STATUS OF THE APPELLANT IS ESTABLISHED BY THE 1912 DECISION OF THIS COURT IN UNITED STATES v. UNION STOCK YARD AND TRANSIT CO.

The first of these cases, *United States* v. *Union Stock Yard and Transit Co., supra,* was brought by the United States at the request of the Commission. The prayer of the complaint was that an injunction issue restraining the Union Stock Yard and Transit Company and the Chicago Junction Company and each of them from further engaging in interstate commerce until the former had filed its tariff stating its charges for the loading and unloading service performed by it, and the latter had filed its tariff stating its charges for the switching services performed by it. The Court held each of these companies to be a common carrier by railroad and required each to file its tariffs

under Section 6 and to file its reports in conformity with Section 20 of the Act. The appellant was required to file the tariff which it now seeks to withdraw.

For more than forty years, a period beginning long prior to the decision of the Court, the appellant has not operated any locomotives or cars. (R. 29.) Throughout that period the tracks owned by it which serve the Yard have been leased to other carriers. From a time prior to 1912 and up until 1922 the tracks were leased to the Chicago Junction Company; since 1922 they have been leased to a subsidiary of the New York Central Company. Appellant's annual income from the operation of those tracks is now somewhat greater than that received from the Junction Company in the years preceding the decision of the Supreme Court in 1912. (R. 31, 32.) The Junction and the appellant were in 1912 and are now owned by the same holding company. (R. 32.)

In the 1912 case, the Court was called upon to determine the status under the Act of both the Junction Company and the Yard and Transit Company. For this reason there is discussion in the opinion of the activities of each company and of their corporate history and relationship. Pointing to this discussion it is argued that appellant was held subject to the Act, not because of its own operations, but only in a sort of vicarious capacity, and solely because the Junction was found to have that status. The Junction having subleased the appellant's tracks to the New York Central in 1922, it is argued, in reliance upon this theory, that the Yard and Transit Company ceased to be a common carrier in that year. This view is in conflict with the Court's decree. The specific service which appellant was required to cover by tariff publication, pursuant to Section 6 of the Act, was not a service performed or participated in by the Junction; it was the service of loading and unloading performed by the appellant alone.

For forty years that has been the only service performed by the appellant in connection with the movement of livestock to and from the Yard, and it is a service which has not been affected in the slightest degree by the 1922 lease or any of the previous leases upon which appellant has relied from time to time to relieve itself of its status under the Act. None of these leases have covered any facilities used by appellant in the loading and unloading services.

From the very beginning of the operations of this Yard, the trunk lines, through the exercise of running rights over the tracks of the Yard and Transit Company, have handled the livestock to the unloading chutes with their own power. Neither the Junction[1] nor the appellant has ever participated in the handling of the stock until it has been placed at the unloading platforms and then it is the appellant which has always taken control of the stock and performed the unloading service. This was the fact for many years prior to 1912 and it is the fact today. There has never been any change in the handling accorded the livestock by appellant. The services performed by it today are admittedly exactly the same services which in 1912 this Court required it to cover by tariff publication pursuant to Section 6 of the Act.

In thus requiring the loading and unloading service of appellant to be covered by tariff this Court necessarily held that service standing alone, in and of itself, to be a common carrier service. If, as argued, the Court ordered appellant to publish its charges for the loading and unloading service not because of the character of that service itself but solely because the Junction was found to be a common carrier, it might well be asked why the Court did not also require the appellant to file with the Commission its charges for the many stockyards services performed by

[1]Except for a special service on horses and mules. (R. 338.)

it. The Court did not do so because only common carrier services are required to be covered by tariff publication under Section 6 of the Act. It follows that the decision of the Court definitely established the status of appellant's loading and unloading service to be a common carrier service. In this connection we direct attention to the following statement in appellant's brief (p. 52):

> "Had it been the intent of the Act to make such agent a common carrier, the Congress seemingly would have required such charges to be filed by the agent performing the service and not by the railroad company, *since by Sec. 6 it is the carrier furnishing the service to the shipper which must file the charges assessed against him.*" (Italics added.)

We agree with the view expressed by the words italicized. It follows that when this Court in its 1912 decision required appellant to file its loading and unloading charges under Section 6 of the Act, appellant was thus found to be "the carrier furnishing the service to the shipper." There has been no change of any character in the circumstances under which appellant furnishes this service to the shippers.

The appellant did not intend that the 1922 lease should affect its status as a common carrier by railroad and its conduct in the years following the making of the lease shows that it did not believe the lease had had that effect. At the time the 1922 lease came before the Commission in the *Chicago Junction* case (71 I. C. C. 631 (1922)), appellant's tariff covering the loading and unloading services had been on file for ten years. The tracks proposed to be leased in that proceeding did not include the facilities employed in the loading and unloading of the livestock which this Court required appellant to cover by tariff publication in 1912. The report of the Commission approving the lease on certain conditions shows that it was not suggested by the appellant, a party to

the proceeding, or by anyone else, that the proposed lease had any relation to the common carrier status of the Yard Company in the performance of the loading and unloading service.

From the time in 1911 when the Commission requested the Attorney General to bring suit to compel the Yard and Transit Company to file its tariff, the formal decisions of the Commission show its constant belief that the public interest required the regulation of appellant under the Interstate Commerce Act. If the Yard and Transit Company had expected to free itself from that regulation by inducing the Commission to find the 1922 lease to be in the public interest, the concealment of that design would have been a fraud upon the Commission. There is ample evidence, however, that appellant had no such purpose, or indeed had any thought that the proposed change in the lease of its tracks, already under lease for twenty-five years, would affect its status under the Act. Within a few months after the execution of the lease and twice thereafter, the appellant took advantage of its common carrier status and the processes of the Inte state Commerce Act thus available to it, to seek an increase in its charge for the delivery service which it performed. (R. 41.) Not until ten years later when appellant felt that it had advanced its charges to the full extent possible under public regulation did it contend that the 1922 lease had relieved it of its obligations as a common carrier. The precise contention again made here was then urged before this Court in the so-called *"Hygrade case"*[1] (*infra*, pp. 40-43) and was rejected by this Court.

This is convincing evidence that when appellant made and secured approval of the 1922 lease it did not believe that the lease affected its railroad status. The report of the Com-

[1] *A. T. & S. F. Ry. Co. v. United States*, 295 U. S. 193 (1935).

mission herein directs attention to the fact that in this very lease which appellant relies upon to divest itself of the status of a common carrier by railroad, it stipulates, for a consideration, that in its capacity as a railroad it has the power of eminent domain and covenants that it will perpetuate its charter powers, *as a railroad*, and preserve its right of eminent domain, and that at any time it may be called upon by its lessee to do so, it will exercise its power of eminent domain to condemn any additional lands required by its lessee in the operation of the leased lines. (Article V, R. 667.)

In an effort to explain away the basic inconsistency of contending that under this lease its status as a railroad is both preserved and destroyed, appellant declares that various agencies which are not railroads have the power of eminent domain. That is true, but the power of the appellant to take lands by eminent domain for railroad purposes was not granted to it as a Cemetery Association or as a Drainage District, or in any other capacity save "as a railroad," and that power which it has so carefully preserved and which it covenants to use upon request of its lessee is now held by it as a railroad corporation.

Appellant seeks to distinguish the 1912 decision on the following grounds:

> "The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists." (Appellant's brief, p. 70)

As far as the "operation and service" of the appellant is concerned, it is the same now as it was in 1912. Then as now it completed the transportation by unloading the shipments which were drawn to its docks by motive power of the trunk-line carriers. Its activities were and are a

vital and integral part of the transportation. The 1912 decision cannot be thus distinguished.

Nor can it be distinguished on the ground that there has been a separation of ownership, even if the change made in the lease in 1922 be taken to be a change of "ownership," as appellant assumes. This Court has squarely held that the decision in *United States* v. *Union Stock Yard and Transit Company* was based upon the fact that the appellant's facilities were "used as an integral part of each railroad line," and not based upon any common ownership with another company. In *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919), the Court said:

> "The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, *even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier. (pp. 304-305.) (italics ours)
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> • • • • • •
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> "As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease

to be such merely because the services which it renders to the public are performed as agent for another." (pp. 306-307.)[1]

None of the three points of distinction alleged by appellant to have been created by the 1922 lease—a change in "ownership, operation and service"—is valid to distinguish the 1912 decision, which, we submit, controls this case.

B. THE STATUS OF APPELLANT AS A COMMON CARRIER, SUBJECT TO THE ACT, HAS BEEN REAFFIRMED BY THE COMMISSION AND THIS COURT IN MANY DECISIONS SINCE IT WAS SO ESTABLISHED IN UNITED STATES v. UNION STOCK YARD AND TRANSIT COMPANY.

The Yard and Transit Company filed its tariff with the Commission pursuant to the decree of this Court early in 1913. In 1917 it desired to make an increase in its charges for the loading and unloading service. Relying upon its status as a common carrier, appellant filed tariffs stating its proposed higher charges. This action precipitated a controversy between the Yard and Transit Company, the trunk line carriers, and the shippers. Faced with the necessity of justifying the higher charges, appellant filed with the Commission a tariff supplement which in terms cancelled its existing tariffs exactly as appellant has again done here. The Yard and Transit Company contended then, as it does again here, that it had ceased to be a common carrier because it had made a new lease of its tracks. The change then relied upon was a new lease to the Junction Company, under which

[1] This decision of the Court also shows how ineffective is the appellant's attempted distinction of *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498 (1911), on the sole ground that the wharfage facilities there involved were owned by a company which was affiliated with a transportation system. (Appellant's brief, p. 73)

the tracks which had been leased for fifty years were leased in perpetuity, and a flat rental of $600,000 a year was provided instead of the profit sharing basis previously in effect. *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); R. 249.

The Commission suspended the operation of the appellant's notice withdrawing its tariffs and entered upon an investigation both of the proposal to withdraw the tariff and of the proposal to increase the charge for the service. During the progress of the investigation the Commission's suspension power expired (under Section 15(7)) and the appellant's cancellation notice became effective. Having thus succeeded in accomplishing the withdrawal of its tariffs, the appellant, taking advantage of its possession of the livestock as the delivering carrier, simply collected the additional charge from the shippers. Here again, in the event it is permitted to withdraw its tariffs, it proposes to collect increased charges.

At the conclusion of its investigation, the Commission held the appellant to be a common carrier subject to the Act and required it to refile its tariffs. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209 (1919). Later in the same proceeding (58 I. C. C. 164 (1920)), an award of reparation was granted against the Yard and Transit Company, on the ground that the collection of the additional charge constituted an unreasonable practice by a common carrier subject to the Act. The validity of this award was sustained by this Court in *Adams* v. *Mills*, 286 U. S. 397, not decided until 1932. Under Section 16 of the Act reparation may be awarded only against common carriers subject to the Act. The effect of this Court's decision sustaining the Commission's award of reparation against the Yard Company, was to reaffirm its earlier finding that the Yard and Transit Company is a common

carrier and subject as such to the Interstate Commerce Act.

Following the decisions of the Commission in the proceedings just referred to, and subsequent to the 1922 lease, the appellant, recognizing and relying upon its status as a common carrier subject to the Act, repeatedly invoked the processes of the Act for the purpose of increasing its revenues: (1) *Loading and Unloading Livestock at Chicago,* 83 I. C. C. 248 (1923); (2) by filing tariffs effective December, 1934, stating increased charges for the loading and unloading service (R. 41); (3) *Livestock to or from Union Stock Yards, Chicago,* 222 I. C. C. 765 (1937).

The jurisdiction of the Commission over the appellant was again put in issue before this Court by appellant in *Atchison, Topeka & Santa Fe Railway Company* v. *United States,* 295 U. S. 193 (1935), generally referred to as the "*Hygrade* Case." In view of the contention which appellant so strongly urged upon this Court in the *Hygrade* case that it had divested itself of its common carrier status by the 1922 lease, the opinion of the Court therein constitutes its third decision holding appellant to be subject to the jurisdiction of the Commission.

The Yard and Transit Company performs certain so-called yardage services on livestock after the unloading service has been completed. For these services appellant collects its charges directly from the shippers pursuant to the tariff which it files with the Secretary of Agriculture. The Hygrade Packing Company brought a proceeding before the Commission to recover payments made to the Yard and Transit Company for yardage services on the ground that transportation and the Commission's jurisdiction do not end with the unloading of the stock but extend beyond that point and include the yardage services in question. The Yard and Transit Company, resisting that contention, took the position, as stated above,

that far from having jurisdiction over its yardage charges, the Commission no longer had any jurisdiction over it at all,—that as a result of the 1922 lease it had ceased to be a common carrier. The question before the Court, therefore, was the point at which the jurisdiction of the Commission over the plaintiff's services ends and that of the Secretary of Agriculture begins.

It was in this case, therefore, arising ten years after the execution of the 1922 lease, that appellant first took the position (R. 461-462, 701-712) that that lease had operated to divest it of its status as a common carrier and to remove it from the jurisdiction of the Commission, which is exactly the contention advanced here. To appreciate fully the significance of the Court's decision it must be understood that the appellant very largely devoted its brief and oral argument in this Court to that point, presenting in full elaboration precisely the argument again made here in respect to the effect of the 1922 lease. The judgment of the Court disposing of that contention, and fixing the boundary line between the jurisdiction of the Commission and that of the Secretary of Agriculture is expressed in the following language:

> "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as now required by Section 15(5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. *The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.*" (p. 201.)

This language is not open to misconstruction. The Court, after stating that public stockyards are subject to regulation, declares that the boundary line between the jurisdiction of the two administrative tribunals *over this appellant* is the point where transportation ends, namely,

with the unloading of the livestock into suitable pens. If the service of loading and unloading by the appellant, and its charges therefor, were not subject to the Commission's jurisdiction, the Commission's jurisdiction would not extend to the point where transportation ends, as the Court declares that it does, but would terminate short of that point.

In its report here before the Court, the Commission comments on the Court's decision in the *Hygrade* case as follows:

> "In the above case the Court had said that 'at least in respect of these shipments' transportation ended with unloading into suitable pens. While this does not purport to be a definite statement as to where transportation ends in the case of all shipments, it is a definite holding that the boundary of the Secretary's jurisdiction 'is the place where transportation ends,' and under Section 15(5) of the act it is clear that transportation could not end short of delivery into the unloading pens. The Court is speaking, it will be noted, of the charges of respondent and not of the railroads' rates and charges against shippers. (R. 39.)
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> • • • • •
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> "We do not think that a harmonious construction of the statute results from, on the one hand, an indisputable jurisdiction over the prescribed delivery into suitable pens, the same having to be treated as an inseparable part of the rail transportation to be furnished by the railroads without separate charge, and, on the other hand, the assumption that we are without jurisdiction over respondent in performing such part of the transportation and its charges therefor which must be included in the line-haul rate. The Packers and Stockyards Act, August 15, 1921, expressly provides that nothing therein shall affect our jurisdiction or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within our jurisdiction. It is plain that Congress did not intend a neutral zone of no jurisdiction over respondent's charges and it is equally plain from the statement above quoted from *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,*

that jurisdiction over respondent's charges to 'the place where transportation ends' was left with us." (R. 40.)

The decision of the Court in the *Hygrade* case is decisive of the issue again before the Court.

Although the decision in the *Hygrade* case was rendered in 1935, it is not the last of the decisions of this Court on the issue presented here. The question came again before the Court in *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470 (May 31, 1938). The Court again held the loading and unloading services performed by a stockyards company to be under the jurisdiction of the Commission and this decision was particularly relied upon by the District Court in the case at bar. (R. 160.)[1]

In the *Denver* case the Secretary of Agriculture, after investigation, established a rate base for the stockyards services performed by the Denver Union Stock Yards and in doing so excluded the loading and unloading facilities of that company, and refrained from fixing any charge for the loading and unloading service, on the ground that that service and the charges therefor, were under the jurisdiction of the Commission. The Secretary based his conclusion on the terms of the two statutes, on the report of the Commission now before this Court, and on the opinion of this Court in the so-called *Hygrade* case[2] discussed above. This Court sustained that action and in view of the Secretary's explicit reliance upon the order of the Commission

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[1] "* * * we are satisfied that the decision is [in] this case must be for the defendant; that the only question involved is one of jurisdiction and that, because of the definitions that are given to 'common carrier' and to 'transportation', the services rendered by the plaintiff make the plaintiff come within the provisions of the Interstate Commerce law. That is strengthened by the late decision of the Denver Stockyards case." (R. 160.)

[2] *A. T. & S. F. Ry. Co.* v. *U. S.*, 295 U. S. 193.

now before the Court it may be said, we think, that in practical effect the Court has already sustained this order of the Commission. The following is quoted from the report of the Secretary:

> "The Interstate Commerce Commission has decided that the service of unloading and loading livestock from and into cars is a common-carrier service subject to the provisions of the Interstate Commerce Act. (See I. C. C. Investigation and Suspension Docket No. 4109, page 342, of which judicial notice is here taken.)
>
> > " 'We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago.'
>
> "The Supreme Court has ruled that the loading and unloading of livestock is a transportation service (295 U. S. 193). The Packers and Stockyards Act provides that nothing therein should affect the jurisdiction of the Interstate Commerce Commission or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission (Packers and Stockyards Act, 1921, Section 406). Inasmuch as the unloading and loading of livestock from and into cars is a railroad service, the charge therefor is for a railroad service and not a stockyard service." *Secretary of Agriculture* v. *Denver Union Stock Yard Co.*, Bureau of Animal Industry Docket No. 450, p. 10 (1937).

The three-judge court upheld the Secretary's order and *this Court* sustaining that action said:

> "Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities." (p. 477.)

The Court thus goes back to its decision in the *Hygrade* case as stating the boundary line which the Congress has established between the jurisdiction of the Commission and that of the Secretary.

We direct especial attention to appellant's futile effort to escape the conclusive force of this decision. (Appellant's brief, pp. 100, 101.) It is said that the Secretary entered no order fixing the rates for the loading and unloading service, from which "it follows that this Court correctly held that the loading and unloading facilities were properly excluded from the rate base," and that "the statements of the Court in its opinion must be read in the light of the question before it." The Secretary made no order fixing rates for the loading and unloading service, and excluded the value of the facilities from the rate base, solely because he found that the Commission had jurisdiction over those rates and facilities and that he, the Secretary did not have such jurisdiction. This Court sustained the Secretary's finding and we submit that appellant's own discussion of this case is convincing that it is decisive of the issue here.[1]

We believe the Court will find that the four decisions which we have discussed express the judgment of this Court on the issue again presented here. A few additional cases

[1]In the argument before the Commission in this proceeding appellant attempted to distinguish the *Denver* case on the ground that at that yard the loading and unloading facilities were leased to the railroads and it was pointed out that the District Court had so found. This finding of the District Court was erroneous. In their respective briefs in this Court the Government (page 23) and the Stock Yard Company (page 61) agree that this statement was error, and that the Yard Company leases certain trackage to the railroads but operates the loading and unloading facilities itself and receives its compensation on a per car basis. The error of the District Court was corrected by this Court at pages 476, 477.

in which the decision in *United States* v. *Union Stock Yard and Transit Company, supra,* has been cited and relied upon are significant.

In passing upon the validity of certain provisions of the Packers and Stockyards Act, in *Stafford* v. *Wallace,* 258 U. S. 495, 516 (1922), the Court said:

> "The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois,* 94 U. S. 113. *Nor is there any doubt that in the receipt of livestock by rail and in their delivery by rail the stockyards are an interstate commerce agency. United States* v. *Union Stock Yards Co.,* 226 U. S. 286."

It will be noted that this statement of the Court is quite inconsistent with the very narrow interpretation which appellant would place upon the 1912 decision of the Court in *United States* v. *Union Stock Yard and Transit Company, supra.*

In *The Tap Line Cases,* 234 U. S. 1 (1914), the Court, again citing its 1912 decision in the *Union Stock Yard* case, said:

> "• • • the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. *It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character.*" (p. 24.)
>
> "Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the State. • • • They are engaged in carrying for hire the goods of those who see fit to employ them. They are author-

> ized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court." (p. 26.)

Counsel for the appellant rely upon *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915), in which the Supreme Court held a car company from which the railroads rented cars and received an icing service not to be subject to the Act. The difference between the vital terminal service performed by appellant and that of one selling services or supplies to the railroads under the circumstances which ordinarily attend such transactions, is exactly the difference between a business affected with a public use and a private business. The distinction between the two is emphasized by the statement in the *Ellis* case, as follows:

> "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request • • •" (p. 443.)

As the Court here states, the trunk-line carriers may appropriately be charged with responsibility of providing necessary equipment and icing services. If they are unable to make satisfactory arrangements for such supplies or services with one agency they may do so with another, or they may supply the instrumentalities themselves. Wholly different is the situation with respect to the appellant's loading and unloading facilities which constitute the throat through which the livestock moving to and from the stockyards must pass. The trunk-line carriers

cannot satisfy the statutory requirement that transportation to public stockyards shall include delivery into suitable pens by making delivery at some other stockyards. Delivery must be made at the appellant's yards when the shipper consigns his livestock to that terminal. If Section 1 (3) and Section 15 (5) are directed at this appellant and place a duty directly upon it to perform the service which it alone can perform, those provisions of the law are meaningful and effective. We submit that that is the interpretation which must be placed upon them to sustain both their purpose and their constitutionality, because if they are interpreted as being directed, not to the appellant, but to the trunk-line carriers alone, they would require the performance of a service which the trunk lines are powerless to perform.

Although the Act defines the service performed by appellant both in general terms (Sec. 1 (3)) and in specific terms (Sec. 15 (5)) as transportation of livestock by railroad, appellant contends that it does not perform the transportation service as a common carrier because it does not *carry* stock. To assert that while engaging in transportation it does not *carry* is, we think, simply to deny what the statute affirms. The essence of appellant's contention, it appears, is that it does not operate locomotives or other motive power. There are many decisions of the courts, in addition to the four by this Court which we submit to be controlling, that an instrumentality of commerce need not operate motive power to be a common carrier. Many of these cases cite and rely upon the decision of this Court in *United States* v. *Union Stock Yard and Transit Co., supra.*

In June of this year the Supreme Judicial Court of Massachusetts held the Boston Terminal Company, which neither owns nor operates locomatives or cars, to be a com-

mon carrier under the Employers' Liability Act. *McCabe* v. *Boston Terminal Co.*, 22 N. E. (2d) 33 (June 30, 1939). The court there said:

> "The Federal Act, insofar as material, provides that 'every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages * * *'" (p. 35).
>
> "A part of the transportation furnished by the railroads began or ended in the defendant's terminal, and some came to and left the terminal in continuance of a single movement in interstate commerce. The defendant's property is private in ownership but public in use. Its premises are the instrumentality that the railroads are by law required to use in the conduct of their interstate and intrastate transportation of passengers, baggage and mail. The primary activity of the defendant is to facilitate and accomplish such transportation. It was performing services like those ordinarily performed by a common carrier and was in direct charge of all transportation occurring upon its premises. The terminal was a necessary link in the interstate system of every railroad that used it. *Batchelder & Snyder Co.* v. *Union Freight Railroad*, 259 Mass. 368, 156 N. E. 698, 54 A. L. R. 616; *Cott* v. *Erie Railroad*, 231 N. Y. 67, 72, 131 N. E. 737." (p. 36.)

In each of the following cases an agency performing necessary terminal services, but not operating any motive power, was held to be a common carrier, and in each reliance was placed upon the decision of this Court in *United States* v. *Union Stock Yard and Transit Co., supra.*

United States v. *Atlanta Terminal Company*, 260 F. 779 (C. C. A. 5, 1919), certiorari denied 251 U. S. 559.

Bordelon v. *New Orleans Terminal Co.*, 14 La. App. 60, 129 So. 452 (1930).

Spaw v. *Kansas City Terminal Railway Co.*, 198 Mo. App. 127, 201 S. W. 927 (1918).

In some of these cases it appears that the terminal companies designated the tracks on which passenger trains would load or unload, and in so doing, controlled train movements. Appellant controls train movements in the same manner. (R. 576, 577, 594, 595, and page 4, this brief.)

III.

THE SECRETARY OF AGRICULTURE DOES NOT HAVE JURISDICTION OF THE LOADING AND UNLOADING SERVICES PERFORMED BY APPELLANT.

Preliminary to this discussion of the jurisdiction of the Secretary of Agriculture, it should be noted that the existence since August 15, 1921 of the Packers and Stockyards Act can have no effect upon the proper construction of the Interstate Commerce Act. The portions of the Interstate Commerce Act establishing the jurisdiction of the Commission over the appellant were enacted prior to August 15, 1921, the date of the enactment of the Packers and Stockyards Act. The alternative before Congress in determining the scope of the jurisdiction of the Commission was either to vest it with the power to regulate the vital transportation services and the charges therefor over which appellant had and still has an absolute monopoly, or to have them wholly unregulated. That Congress decided that regulation was necessary is clear both from the express terms and from the purposes of the Commerce Act.

A. APPELLANT'S ASSERTION THAT THE SECRETARY OF AGRICULTURE HAS JURISDICTION OF THE LOADING AND UNLOADING SERVICES IS (1) CONTRARY TO THE POSITION ORIGINALLY TAKEN BY IT IN THIS PROCEEDING, (2) IT IS CONTRARY TO THE TERMS OF THE GOVERNING STATUTES, (3) IT IS CONTRARY TO THE SECRETARY'S OWN DECISION RESPECTING HIS JURISDICTION, AND, FINALLY, (4) IT IS CONTRARY TO THE CONTROLLING JUDGMENT OF THIS COURT.

(1) In asserting that the Secretary of Agriculture has jurisdiction of the loading and unloading service and that it will file tariffs with the Secretary covering this service, if relieved of jurisdiction by the Commission, appellant is taking a different position from that originally taken by it before the Commission in this proceeding.

Appellant's General Manager and Vice President testified before the Commission as follows:

> "Q. In your testimony in Docket 4109 you said that if the Yards Company was permitted to withdraw these tariffs on file with the Commission, that the determination of the amount to be paid by the carriers for the loading and unloading service would be a matter of barter and trade between the Yards and the yards railroads. Is that still your position?
>
> "A. I said it at that time, but in the development of our plans it may well be that the charges will all be subject to the Secretary of Agriculture and will be arrived at by or with his approval.[1]
>
> "Q. What are those plans that will produce that result which you mention, or to which you refer?
>
> "A. It would be very difficult to state what all those plans are." (R. 312-313.)

Upon the submission of the matter to the Commission in Docket 4109, its attention was directed to the position in which the trunk-line railroads and the shippers

[1]The testimony before the Commission in the first proceeding is not before the Court, but this statement of the witness indicates the original position, and the real purpose of appellant.

would be placed if the Yard and Transit Company, having a monopoly in the performance of this vital terminal service, and having physical possession of the livestock, by which to enforce its demands, should have the unregulated power to collect for its services whatever in its mercy it might choose to demand. After the Commission's first decision herein (R. 28), the appellant reconsidered the wisdom of conceding that its purpose in seeking to defeat the jurisdiction of the Commission, was to free itself from all regulation. Recognizing the opposition which must exist to the view that an agency having a complete monopoly in the handling of livestock into and out of the largest market in the world should be in a position to dictate, free from restraint, the terms upon which it would perform that necessary public service, the appellant has changed its tactics. Although there has been no change in the law, appellant now argues as one of its major contentions that its loading and unloading services must be and are subject to regulation, that its charges for these services are simply on file with the wrong administrative body, that it seeks release from the jurisdiction of the Commission only that it may file its proposed increased charges with the Secretary of Agriculture. Release of the appellant from the jurisdiction of the Commission would free appellant from regulation, just as it would have done three years ago when appellant conceded that to be its objective. The Secretary has no jurisdiction over the service under the Packers and Stockyards Act, and the Secretary himself and this Court have so held.

(2) Section 406 of the Packers and Stockyards Act is as follows:

> "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." (7 U. S. C. Sec. 226.)

The Packers and Stockyards Act applies *to stockyards*. Here is clear legislative recognition that Congress had already given the Commission jurisdiction over stockyard owners with respect to certain matters, which jurisdiction it did not intend to disturb. The decision of the Supreme Court holding this appellant to be a common carrier in respect to its loading and unloading service had been rendered long before the Packers and Stockyards Act was passed, and the Commission was then and had been for years exercising jurisdiction over the appellant's loading and unloading services and the charges therefor. Jurisdiction over the loading and unloading services and charges is the only jurisdiction of the Commission *over stockyards* to which Section 406 of the Packers and Stockyards Act could have referred. Only the year before the enactment of the Packers and Stockyards Act, Section 15 of the Interstate Commerce Act had been amended to provide specifically (in paragraph 5) that transportation of livestock from and to public stockyards includes the loading and unloading of the stock. These facts explain and nothing else can explain, the declaration of Congress that the new jurisdiction conferred upon the Secretary over stockyards would not affect the existing jurisdiction of the Commission over stockyards.

(3) In 1937, during the pendency of this proceeding, bills were offered in the 75th Congress (S. 2129, H. R. 6732) which were designed to legislate the change in the Interstate Commerce Act which this Court is now asked to make by the construction of the Act. The specific, and the only purpose of these bills was to transfer jurisdiction of the loading and unloading service performed by stockyards companies from the Interstate Commerce Commission to the Secretary of Agriculture. The representatives of the appellant appeared at the hearings before the Senate Sub-Committee on Agriculture and Forestry in support of this

change in the law, and all of the large associations of livestock producers and shippers,[1] and the Association of American Railroads appeared in opposition to the proposal to take from the Commission its jurisdiction over stockyards in respect to the loading and unloading service performed by them. Upon request of the Chairman of the Senate Committee on Agriculture and Forestry, the Secretary of Agriculture addressed a letter to the Chairman in respect to the proposed legislation. This letter, as set forth in the official public record of the hearings of the Sub-Committee on Agriculture and Forestry of the United States Senate on S. 2129 (75th Congress, 1st Session), p. 6, reads in part as follows:

> "This amendment would remove from the control of the Interstate Commerce Commission and place under the jurisdiction of the Secretary of Agriculture the loading and unloading of livestock into and from railroad cars at those markets which are subject to the Packers and Stockyards Act, 1921. *Under the law as it now stands such loading and unloading are under the jurisdiction of the Interstate Commerce Commission, since the Interstate Commerce Act provides that railroad transportation of livestock shall include delivery at public stockyards of inbound shipments in suitable pens and the receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee, or owner.* 49 U. S. C. Sec. 15 (5). While the duty is thus placed upon the railroads, it is actually performed for them by the stockyards; but, being a transportation service, the Interstate Commerce Commission has held that it has the power to say what the stockyards shall charge therefor. *That view of the law was upheld by the Supreme Court of the United States in Atchison, Topeka & Santa Fe Railway Co. v. United States,* 295 U. S. 193. *This Department, therefore, does not undertake to fix*

[1] American National Livestock Association, National Livestock Marketing Association, National Wool Growers Association, Texas and Southwestern Cattle Raisers Association, Texas Sheep and Goat Raisers Association, Highland-Hereford Breeders Association, Livestock Traffic Association.

rates and charges for that service. There is, accordingly, no conflict in this matter between the Commission and this Department." (Italics ours.)

Subsequently, in his formal order in the *Denver Union Stock Yard* Case, *supra*, the Secretary held that he had no jurisdiction over stockyards in respect to the loading and unloading service performed by them.[1]

(4) In *Denver Union Stock Yard Co.* v. *United States*, decided May 31, 1938, 304 U. S. 470, this Court has sustained the finding of the Secretary that he does not have jurisdiction of stockyards in respect to the loading and unloading services performed by them.[2] This decision is conclusive. If the Commission should now be held to lack jurisdiction, those transportation services and charges will be wholly unregulated.

B. UNDER APPELLANT'S THEORY THERE WOULD BE DUAL JURISDICTION BY THE COMMISSION AND BY THE SECRETARY OF AGRICULTURE OVER THE LOADING AND UNLOADING SERVICE, AND ADMINISTRATIVE CONFLICT AND CONFUSION WOULD BE INEVITABLE.

Appellant contends that it is not subject to the Interstate Commerce Act and has no duty to the shippers thereunder. It is asserted that the trunk lines alone have a duty to the shipper under Sections 1 and 15 of the Act to load and unload the livestock as a part of the transportation service; that the appellant's only duty is under the Packers and Stockyards Act, and that that duty is to perform the loading and unloading service for the trunk lines, as their agent, for charges to be filed with the Secretary of Agriculture. Since the terms of Sections 1 and 15 of the Interstate Commerce Act so clearly make the loading and unloading service transportation by railroad, appellant recog-

[1] See page 44 of this brief.

[2] See pages 43-45 of this brief.

nizes that its argument that it is subject only to the Packers and Stockyards Act forces it to construct some theory under which both the Commission and the Secretary would have jurisdiction of the loading and unloading service and the charges therefor. We find this theory stated (on page 100 of its brief) in the following language:

> "As Mr. Commissioner Eastman stated in the above excerpt from his dissenting opinion, the loading and unloading service, as between the railroad and the shipper, is a transportation service subject to the jurisdiction of the Commission, but, as between the railroad and the stockyard company, it is a stockyard service subject to the jurisdiction of the Secretary of Agriculture."

Any effort to give practical effect to such a construction of these Acts would create administrative conflict and intolerable confusion.

If the appellant refused to perform the loading and unloading service, or failed to perform the service in a manner satisfactory to the shipper, and the shipper, relying upon the requirement of Section 15(5) that transportation shall include "delivery into suitable pens", complained to the Interstate Commerce Commission, the Commission, under appellant's theory would be powerless to correct the evil. Deprived of its jurisdiction over appellant which alone owns and operates the facilities necessary to effect delivery, the Commission could issue an order only against the trunk lines; and such an order would be wholly nugatory because the trunk lines would be incapable of making it effective. If the Commission found that the requirements of the Interstate Commerce Act were not being satisfied, the Commission itself, the shippers, or the line-haul carriers would then have to institute proceedings against the appellant before the Secretary of Agriculture, but under appellant's theory the issue before the Secretary would not be the rights of the

shippers under the Interstate Commerce Act, or the duty owed to them by the line-haul carriers under that Act, but rather the duty of the appellant to the trunk lines under the Packers and Stockyards Act. These respective duties would arise under different statutes and would be interpreted and administered by different tribunals. In short, on appellant's theory, the right of the shippers to the service would arise out of and be measured by the terms of the Interstate Commerce Act, but could be enforced not by proceedings under that Act, but only through a second proceeding under a different statute and before a different tribunal. What the shippers had a right to demand under the Interstate Commerce Act before the Commission might be found to be very different from what the appellant was required to furnish under the Packers and Stockyards Act as found by the Secretary of Agriculture.

Such a hopelessly confused situation involving probabilities of a complete administrative stalemate could not have been the intention of Congress at the time the Packers and Stockyards Act was passed, and this is shown by the provision of the Act expressly reserving the Commission's jurisdiction over stockyards. Obviously it could not have been the intention of Congress at the earlier date when Section 15(5) was passed, and before the enactment of the Packers and Stockyards Act, to leave wholly unregulated the Yard and Transit Company's performance of these services, and the charges therefor, which were explicitly defined as a part of transportation by railroad. Especially is this true since the intention of the shippers and of the Congress, as declared by Senator Cummins, was to place "the whole subject within the jurisdiction of the Interstate Commerce Commission."[1] Yet both of these conclusions would be necessary under appellant's theory.

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[1]See page 20, *supra*.

Appellant's whole case culminates in a theory to dispose of which the Court need only attempt to envisage its practical application.

C. TO REMOVE THE DELIVERY SERVICE PERFORMED BY APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DISRUPT A COMPLETE SYSTEM OF FEDERAL REGULATION AT A VITAL POINT.

Since the decision of this Court in 1912, the Commission has regulated the rates for the delivery service performed by the appellant and has thus exercised complete jurisdiction over the transportation of livestock from the country station where it originates until the animals have been placed in suitable pens in the Union Stock Yards. But Federal regulation of the handling of livestock in interstate commerce does not end there. Since the passage of the Packers and Stockyards Act in 1921 the Secretary of Agriculture has exercised complete jurisdiction of the handling of the animals within the yards. There has been a complete correlation between the regulation of the Commission and that of the Secretary. The Commission had been regulating the loading and unloading service and charges for years when the Packers and Stockyards Act was passed and the Congress provided in that Act that nothing therein would affect the jurisdiction of the Commission over stockyards. From the outset the Secretary has given full recognition to the clear purpose of that provision of the Act. There has been no overlapping of their respective jurisdictions. Both tribunals have recognized, and the Supreme Court has held, that the jurisdiction of the Commission ends after the unloading, and that it is not until the unloading service has been performed that the jurisdiction of the Secretary begins.[1] There exists, therefore, a unified pat-

[1] *Denver Union Stockyard Co.* v. *United States*, 304 U. S. 470 (1938); *A. T. & S. F. Ry. Co.* v. *U. S.* (The *Hygrade* case), 295 U. S. 193 (1935).

tern of Federal regulation governing the handling of livestock in interstate commerce from the time it is loaded at the country station until it passes out of the stockyards at the central market.

In seeking immunity from regulation, plaintiff is forced to contend that there is a defect in this regulatory fabric which leaves the Commission powerless to require the performance of or to prescribe the charges for the vital delivery service necessary to complete the transportation of the stream of livestock, moving to and from the Chicago livestock market.

IV.

THE STATUS OF APPELLANT UNDER THE ACT IS UNAFFECTED BY ANY CONSIDERATION OF WHETHER OR NOT IT PERFORMS THIS TERMINAL SERVICE ON LIVESTOCK AS AGENT OF THE TRUNK LINE RAILROADS.

Throughout its brief appellant emphasizes the contention that it performs this terminal service on livestock as the agent of the trunk lines.[1] This Court has held that a

[1] In the performance of this terminal service on livestock, appellant does not act as the agent of the trunk lines in any true sense of the word. We are content, however, merely to state our position on the question because under the view taken by the Supreme Court, *Adams* v. *Mills*, 286 U. S. 397, it is immaterial to this inquiry. It is elementary that an agency exists only when one acts for or represents another, by the latter's authority,—it is the product of contract either express or implied. The circumstances under which the Yard performs the service of loading and unloading are accurately described by the appellant itself, in the statement in its brief before the Commission of August 20, 1935 (p. 10), that "this service (of loading and unloading) is made necessary by the fact that the trunk line carriers do not themselves own facilities at the stockyards *through which the requirement of the statute* can be made by them." As appellant there states, the basis for its participation in the transportation service is derived not from the consent of the trunk lines, but solely from its dominant, physical position, and from the operation of the statute.

common carrier under the Act may perform its common carrier services in the capacity of agent of other railroads[1] and that its status under the Act is unaffected thereby.

Appellant seeks to avoid any direct attack upon the soundness of this view of the Court. But it seeks indirectly to impeach the principle stated by the Court by the argument that "Congress either intended by the provisions in question to make all such agents common carriers or it did not. If any are, all are; and if one is not, none is." (Appellant's Brief, p. 49.) The gist and the direction of this argument is that if appellant, acting as agent of the trunk lines, is a common carrier, all agents of common carriers must also be held to be subject to the Act, with the result that there would be brought within the scope of the Act and the jurisdiction of the Commission a vast number of miscellaneous agencies which Congress could not have intended to regulate.

Faced with the categorical statement of the Court in *Adams* v. *Mills, supra,* directed at the appellant's own status, appellant is unwilling to argue directly that it does not have the status of a common carrier under the Act *because* (as it contends) it acts only as the agent of the trunk lines. Rather, it prefers an oblique attack upon the principle stated by the Court by declaring that if it is subject to the Act it necessarily follows that all the miscellaneous agencies to which it refers must also be subject to the Act, and that Congress did not so intend. Neither did this Court

[1] In *Adams* v. *Mills*, 286 U. S. 397, 415 (1932) the Court *speaking of this appellant* said: "Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers • • • ." The same principle is stated in *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366 (1925); *U. S.* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919); *Southern Pacific Terminal Co.* v. *I. C. C., et al.*, 219 U. S. 498 (1911).

so intend. The Court held that "it did not follow from such status [—the status of the Yard and Transit Company as a common carrier—] that it could not act as an agent of the line haul carriers" (p. 415). In other words appellant is contending in effect that the principle which the Court thus applied to appellant would bring all agents performing service for the trunk lines within the purview of the statute; that Congress did not so intend, and that the finding of the Court is therefore erroneous.

In its report before the Court the Commission states:

> "We do not entertain the view that every terminal agency, performing for the railroads some service falling within the definition of 'transportation' contained in Section 1(3) could, or should, be held to be a common carrier subject to the Act. The views expressed relate to the subject matter which is before us, namely, the services performed by the Union Stock Yards, and rest, not only on the Union Stock Yards case, *supra*, but also on the language of Section 15(5), and the giving of harmonious effect to its purpose." (R. 39.)

Referring to this statement the appellant says:

> "* * * The Commission disavows giving to the Act an interpretation whereby all persons performing transportation services as agents of a carrier thereby become themselves common carriers, but suggests no rule of interpretation by which some thereby become common carriers and others not." (Appellant's brief, p. 49.)

Neither did this Court in *Adams* v. *Mills* think it necessary to state the "rule of interpretation" by which some thereby become common carriers and others not. It was the duty of the Interstate Commerce Commission to pass upon the status of appellant on the facts pertaining to appellant and not to provide a general rule of thumb by which to determine which, if any of the miscellaneous agencies referred to by the appellant are within the scope of the Act. Appellant cannot deny however that in the long

period that the Commission has regulated the appellant, a practical line of demarcation has actually been drawn between the business of the appellant and that of the many agencies to which appellant refers. It is necessary only to name some of the other services to which appellant refers (Appellant's brief, p. 60) to see that they all stand on a different footing from that performed by appellant. None of the agencies to which appellant refers, except those performing the loading and unloading services at public stockyards, have such a monopoly as to give them an absolute veto power over the completion of the transportation service which the Act requires. The Commission's control over the appellant has already been exercised not only without injury to the public interest, but in the protection of that interest for more than 25 years. The argument that if that jurisdiction is not now terminated a great number of miscellaneous agencies will be brought within the jurisdiction of the Commission, presumably with dire results, reaches it high-tide in the statement that "Congress did not intend that every village drayman performing transfer service between railroad stations should be required to keep his books in accordance with the accounting rules of the Commission or compelled to apply to it for authority to place a mortgage on his home." (pp. 61, 62.)

As appellant argues, the Congress may not have intended to subject to the jurisdiction of the Commission the contract under which the village drayman undertakes to perform certain services for the railroads. But appellant owes its participation in the transportation service not to private contract, but to a statute which requires that livestock moving in interstate commerce be delivered, if so consigned, upon the appellant's property, and the fact that no one else can perform the required service of delivery. Only by means of the services and facilities of appellant

can the great stream of livestock be transported to and from the Chicago market, and this makes the business of appellant a public business. That Congress did not intend to regulate the private contract with the village drayman falls short of showing that Congress did not find regulation of the appellant to be essential in the public interest.

The decision of the Court in *Adams* v. *Mills, supra,* disposes of all appellant's various arguments which derive from its contention that in the transportation of livestock by railroad, as those terms are defined in the statute, it acts only as agent.

V.

THE APPELLANT HAS TWICE BEEN ACCORDED A FULL AND FAIR HEARING BY THE COMMISSION.

The appellant's argument that it was denied a full hearing is without foundation. It was given full opportunity, both in the 1935 and the 1937 proceedings, to introduce any evidence it wished regarding its corporate history, its properties, its tariffs, and its operations, past and present. But in the last hearings it attempted to go much further and to force the Commission to take evidence and try out in this proceeding the status under the Interstate Commerce Act of 135 other stockyards and of a great many other companies engaged in a variety of businesses. It sought to offer evidence as to "the tariffs and practices in the handling of cotton in the southwest" and the status under the Act of the many agencies handling such cotton. (R. 564, 567-568) It sought to force the Commission to investigate the situation respecting "independent contractors, lighterage companies, wharf companies, dock companies" at "all of the ports in the United States". (R. 568) Such an inquiry would have been entirely pointless on appellant's own theory, unless the Commission had be-

fore it facts sufficient to enable it to formulate a judgment as to the status under the Act of each of such miscellaneous agencies. The Commission's refusal to turn this case, in effect, into a nationwide general investigation, and its refusal to accept evidence which would be pertinent only to such an investigation, does not constitute a denial of a full hearing to the appellant. To pass upon the status of these hundreds of other agencies, as demanded by appellant, the Commission must have called before it the parties affected and permitted them to be heard, or it must have reached a judgment as to their status in their absence, and upon such evidence as the appellant was pleased to offer. We submit that the Commission was not bound to do either in order to pass upon the single issue precipitated by appellant, as to its right to withdraw its tariffs.

Appellant complains first that the evidence sought to be introduced was relevant and material and its rejection erroneous, second, that it was improperly denied the right to make an adequate record for the review of this question, and third, that it was not permitted to identify and offer exhibits presenting its evidence on this subject.

A. THE DISTRICT COURT HAS RIGHTLY HELD THAT THE REJECTION OF THIS EVIDENCE BY THE COMMISSION DID NOT DEPRIVE APPELLANT OF A FULL AND FAIR HEARING.

To support the admissibility of this evidence appellant purports to rely upon the familiar rule that in the interpretation of ambiguous statutes a uniform interpretation of the administrative authority is entitled to weight, citing *Louisville & Nashville R. R. Co.* v. *United States*, 282 U. S. 740, 757 (1931), and the *Pocket Veto Case*, 279 U. S. 655, 689 (1929). But appellant did not seek to show a uniform practice or interpretation by the Commission. Appellant did not and could not deny that for more than twenty-five years the Act has been uniformly construed by the Com-

mission and by the Court as subjecting the appellant to the jurisdiction of the Commission, adversely to appellant's present contention as to its status.

In 1912 the Commission caused the institution of proceedings resulting in the determination by this Court that the provisions of the Interstate Commerce Act place the Yard and Transit Company under the jurisdiction of the Commission. *United States* v. *Union Stock Yard and Transit Company of Chicago*, 226 U. S. 286 (1912). Since that time, and prior to its decision here, the Commission frequently had occasion to consider the status of the Yard and Transit Company under the Act, and had consistently construed the Act to apply to that Company.[1] The uniform construction thus placed upon the statute by the Commission over a period of many years is that the Act places the Yard and Transit Company under the jurisdiction of the Commission. If there are other stockyards where the conditions are in all respects similar to those at Chicago, and if the Commission has not taken action to require the filing of the tariffs of those companies, those facts would at most tend only to show that the Commission had not yet corrected all violations of the Act. But they would not, and, in the face of the decisions cited above, could not show that under the uniform practice and interpretation of the Commission a company such as the Yard and Transit Company was not subject to its jurisdiction.

In its argument on this point appellant cites *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 118 (1914) in which action was brought against the railroad in the Superior Court of Massachusetts to recover for the loss of

[1] *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164 (1920); *Live Stock Loading and Unloading Charges*, 61 I. C. C. 223 (1921); *Loading and Unloading Live Stock at Chicago*, 83 I. C. C. 248 (1923); *Livestock To or From Union Stock Yards*, 222 I. C. C. 765 (1937).

baggage. The Court held that a requirement published by the Interstate Commerce Commission in its official tariff circular, and intended for general application, constituted an interpretation of the Act in question and was admissible. But in the *Hooker* case no one attempted to impeach the Commission's formal interpretation of the Act by offering evidence purporting to show that certain parties had not observed the requirement stated in the tariff circular. That is what is attempted here and the *Hooker* case is not in point.

In *Adams* v. *Mills*, 286 U. S. 397, the Court sustained an award of reparation against the appellant under Section 16 of the Interstate Commerce Act. In the course of its opinion the Court said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at *these yards*; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311." (pp. 409-410.)

The question must be determined, said the Court, in respect to the particular situation existing at Chicago, and the conditions at other markets were wholly immaterial:

> "Certainly the Commission could reasonably determine upon this evidence that conditions with respect to live stock in Chicago justified a different rule from that obtaining in other places; that, in fact, a different practice had prevailed; and that no reason existed for permitting a departure from that practice." (pp. 414-415.)

Neither in *Adams* v. *Mills* nor in its 1912 decision did the Court concern itself with the question whether some company not before it was violating the Act as construed by it in these decisions.

A decision of the Ninth Circuit Court of Appeals (certiorari denied) in a case arising before the Federal Trade Commission is singularly apposite here. *Hills Bros. Co.* v. *Federal Trade Commission*, 9 F. (2) 481 (C. C. A. 9, 1926), cert. den. 270 U. S. 662. It was there held that a Commission acting to prevent a violation of the statute by the party before it, cannot be forced in that proceeding to pass upon the status under the Act of all others to which the defendant may desire to direct attention. The court stated the facts and its ruling as follows:

> "The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error. If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of." (pp. 484-485.)

We submit that the proffered evidence was not material to a determination of the status of appellant, was not competent as the basis for any conclusion as to the status of agencies not parties to the proceeding, and was properly rejected.

It should be pointed out, too, that a rule requiring the Commission to enter upon such an investigation as that demanded by appellant here would produce grave administrative difficulties. To force the Commission to receive evidence and to determine the status of hundreds of other businesses before it could rule upon the right of the applicant to withdraw tariffs from the Commission, would result in an administrative paralysis and defeat the purposes of the Act. Such a sweeping nationwide investigation as the appellant demanded in this case, assuming that the parties affected would be given full opportunity to be heard, could not be completed within the period of seven months during which the Commission had power to suspend the operation of appellant's cancellation tariff. (49 U. S. C. Sec. 15(7).) Certainly the Act's provision for a full hearing does not require the Commission to enter into such an investigation that the withdrawal action which precipitated the proceeding would become effective long before the Commission could make its order with reference thereto. Nor can it be intended to place the Commission and the public at the mercy of the respondent's voluntary decision on whether it would extend the effective dates of its cancellation notice. It should be recalled in this connection that on a previous occasion when the appellant sought to withdraw its tariffs, and the hearings before the Commission in respect to the validity of that action became protracted, appellant declined to postpone the effective date of its cancellation notice, which thereupon became effective (page 19, this brief).

The Act contemplates that the Commission shall determine when and under what circumstances general investigations shall be undertaken by it. (Sec. 13(1), (2).) In this connection it may be noted that on the same day that the Commission decided this case, July 11, 1938, it entered an order upon its own motion instituting a general

nationwide investigation into the status of stockyard companies as common carriers by railroad subject to the Interstate Commerce Act to determine whether said stockyard companies "are violating any provisions of the Interstate Commerce Act."[1] Extensive hearings have been

[1] "ORDER.

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of July, A. D. 1938.

"EX PARTE 127. STATUS OF PUBLIC STOCKYARD COMPANIES.

"The Commission having under consideration the subject of the status of public stockyard companies, in respect of the transportation services performed at the stockyards of said companies, in connection with the unloading and loading of carload shipments of live stock transported by railroad in interstate commerce to and from the public yards of said stockyard companies; and the relations between said stockyard companies and common carriers by railroad, and between said stockyard companies and persons or corporations receiving at or shipping from said public stockyards live stock transported by railroad in interstate commerce to and from said stockyards:

"*It is ordered*, That the commission, upon its own motion, enter upon an investigation into and concerning the status of said stockyard companies as common carriers by railroad subject to the Interstate Commerce Act, in respect of the transportation services performed at said stockyards in connection with the unloading and loading of carload shipments of live stock transported by railroad in interstate commerce to and from the public yards of said stockyard companies, said investigation to include a full inquiry into

"1. The relation, direct or indirect, between any of said stockyard companies or their officials and (a) common carriers by railroad, and (b) any person, firm or corporation receiving at or shipping from said stockyards live stock transported by railroad in interstate commerce to and from said stockyards.

"2. The management or operation of said stockyard companies by common carriers by railroad, or by officials, employees or subsidiary or affiliated companies of common

held in this proceeding and the hearings are not yet concluded. Thus the Commission has itself proceeded in an appropriate investigation, and on due notice to the parties affected, to ascertain the conditions at other stockyard companies and to determine their status. In no circumstances would it have been proper for the Commission to have formulated a judgment as to their status except in a proceeding in which they had been made parties.

B. THE RECORD CLEARLY PRESENTS FOR REVIEW THE QUESTION OF THE ADMISSIBILITY OF THE EVIDENCE WHICH THE COMMISSION DECLINED TO RECEIVE.

All of the parties to the proceeding except appellant recognize that the question as to the admissibility of this evidence which has been squarely passed upon both by the Commission and the District Court, is clearly raised by the record and may properly be considered and passed upon by this Court. Presumably this is the result which appellant also must desire.

That the record does show the character and purpose of the excluded evidence is conclusively established, we believe, by a comparison of the appellant's own description of the excluded evidence, as set forth in its complaint (R. 8-11) with the description of that evidence by the Commission in its report (R. 25, 26; Appellant's Brief, pp. 106-107).

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carriers by railroad, and the management or operation of common carriers by railroad by said stockyard companies, or by officials, employees, or subsidiary or affiliate companies of said stockyard companies.

"3. Operating practices in connection with the transportation services performed by said stockyard companies.

"4. Whether said stockyard companies are common carriers by railroad subject to the provisions of the Interstate Commerce Act in respect of the transportation services performed by them, or are violating any provisions of the Interstate Commerce Act. * * *"

Appellant experienced no difficulty in apprising the District Court of the character of the evidence which it proposed to produce and it has experienced no difficulty in doing so in its brief in this Court. It was manifest at the hearing and the record shows that appellant's real complaint is not that it was denied the right to make an offer which undoubtedly preserved the question for review, but rather that it was not permitted, under the guise of making an offer to prove, to put into the record in question and answer form, and in full length the detailed showing which it had prepared on this subject exactly in the form in which it had been prepared. The presiding Commissioner at the first hearing[1] (R. 273, 274) and the presiding Examiner at the subsequent hearing[2] (R. 381, 389, 515) were not only at all times ready to receive, but repeatedly urged counsel for appellant to offer, a description of the nature and purpose of the evidence sought to be introduced. After prolonged efforts to incorporate in the record the full showing prepared in the form in which it had been prepared, together with the many ex-

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[1] "Commissioner Splawn: I sustain the objection and will ask Mr. Shaw when you offer testimony that you merely state the character of it and not undertake to put on the record the details which you would like to have the witness testify to." (R. 273)

"Commissioner Splawn: Now, Mr. Shaw, you are a very able and skilled counsel. You are here to help the Commission. I ask you to state the general purpose of your testimony and not to undertake yourself to testify." (R. 274)

[2] "Exam. Carter: I will sustain the objection and I want to state here that these offers giving the details of the testimony are not going to be accepted. In other words we will accept, if you will make your general offer of proof of what you want to prove without showing in detail what the proof is, we will accept that offer of proof, but I am not going to accept offers of proof in great detail." (R. 389)

hibits included in the showing, *exactly as if the entire showing had been found admissible and received in evidence,* counsel did finally make a record which leaves no possible doubt as to the question presented by the offer.

The Court should know how full has been the Commission's consideration of the admissibility of this evidence. After the Commission's decision in Docket 4109 (*Livestock Loaded and Unloaded at Chicago,* 213 I. C. C. 330 (1935) (R. 28)) appellant filed a petition to reopen the proceeding for the purpose among others, of taking evidence bearing upon the status of other yards, *no such evidence having been offered by appellant at the hearing in that proceeding.* In the petition referred to appellant sets forth the nature and purpose of the evidence it proposed to produce regarding twelve illustrative yards. (R. 712, 723-727) The Commission denied the petition and declined to reopen the case. As stated elsewhere, appellant obtained a rehearing by withdrawing its cancellation notice and then refiling it. (R. 23, 24)

At the first hearing in the second proceeding, evidence of this character was offered, and after argument concerning its admissibility, Commissioner Splawn, then presiding, refused to permit the appellant to enter upon the introduction of this material and to incorporate in the record the full showing prepared and in the form in which it had been prepared. (R. 273) As stated above, the Commissioner, however, did urge counsel for the appellant to state for the record the nature and the purpose of the showing which he desired to introduce. (R. 273-274)

At a later hearing, after the appellant had again attempted to incorporate in the record the testimony and exhibits which had been prepared concerning other stockyards and agencies, the Examiner heard statements by appellant's witness and its counsel describing the proposed evidence, and listened to extended arguments on the ad-

missibility of the showing in which statements and argument the appellant fully set forth the character and purpose of the data in question. (R. 381, 383-392, 433-440, 446-470, 486-488, 491-538, 564-568.)

One of the many companies covered by appellant's showing (the Sioux City Stock Yards Company) was taken as illustrative and counsel for appellant made a full statement detailing the 23 exhibits it proposed to offer in connection with that company alone.[1] (R. 511-513) The nature and relevancy of that evidence was then fully discussed, the discussion occupying pages 515 to 538 of the record. No purpose except delay could have been served by going through the same procedure for each of the other companies.

At the close of the hearings, appellant filed with the Commission a petition for a further hearing before submission, and for an order requiring the Examiner to permit the introduction of the evidence. The petition occupies thirty-five pages of the record on this appeal (R. 164-199), and fully sets out the character of the data in question. After due consideration, the Commission refused to

[1] "Exam. Carter: Why can you not make your argument as to admissibility now? What is to prevent you from doing that?

"Mr. Gladson: I will make my argument as to Sioux City, and perhaps that will be determinative of similar evidence.

"Exam. Carter: I did not hear that.

"Mr. Gladson: I say I will be glad to cover the Sioux City situation and possibly Sioux City will be determinative of what the Examiner will do in connection with the other * * *.

"Exam. Carter: Live stock markets?

"Mr. Gladson: * * * Live stock markets. I assume that probably is true, but I am going to make an offer, if the ruling is adverse, to make a showing at these other yards." (R. 515)

broaden the scope of this case by entering upon an investigation, national in scope, of the conditions and status of these other companies. (R. 199)

Again, in its exceptions to the Examiner's report, appellant argued the exclusion of this evidence and again set out at length its character and purpose. (R. 200, 207-211, 224-225) Again the Commission considered the relevancy of the evidence, and again found it to be irrelevant. (R. 22, 25, 26) Appellant then complained to the three-judge District Court of the Commission's refusal to receive this evidence, setting out the nature and the purpose of the rejected showing. (R. 8-12, 14) After full argument, the court sustained the Commission's rejection of the evidence. (R. 116)

C. THE EXAMINER AUTHORIZED THE APPELLANT TO MARK ITS EXHIBITS FOR PURPOSES OF IDENTIFICATION BUT THE APPELLANT FAILED TO DO SO.

Appellant's third point in respect to the evidence is that appellant was not permitted to have its excluded exhibits marked for identification. (Appellant's brief, p. 104) *This statement is untrue.* The Examiner did authorize the marking of the exhibits for purposes of identification, stated that he would permit the designation to appear in the record, and advised how they could be brought to the attention of the Commission. Appellant has omitted a very important part of the Examiner's rulings which we supply below.[1]

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[1] "Mr. Carter: If you want me to give marks to the exhibits that you may more readily refer to those exhibits, I will give certain marks but I will not continue the marks in the succession of the exhibits which are received in evidence in this case. If you want to do that, I will do that, for your convenience. (R. 540)

• • • • •

"Exam. Carter: I will adhere to my ruling, but if

Counsel for the appellant refused to make this identification on the record as permitted by the Examiner. Instead, he proposed that the identification of the excluded exhibits (none of which, it was expressly declared, related to the situation at Chicago) should be made privately

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you parties want, for your own convenience, to have these exhibits which you are offering marked, I will allow them to be marked starting with Number A.

"Mr. Gladson: Well, Mr. Examiner, is it understood that even after we get them marked we won't be given an opportunity to offer them in evidence?

"Exam. Carter: I think that I have already ruled on that, but if you want me to rule specifically, I think I will do it. I rule on it on the ground that the testimony is irrelevant and immaterial; that this issue here is whether or not the Union Stock Yard and Transit Company of Chicago is a common carrier subject to the act, that no matter what the conditions at other stock yards may be, those conditions cannot have any bearing upon or any effect upon the commission's determination of the status of the Union Stock Yard and Transit Company.

"Mr. Gladson: Mr. Examiner, I do not feel disposed to accept the ruling of the Examiner as final in this case. I am suggesting at this time that the hearing be postponed to give the respondent an opportunity to take up with the full commission the question of the admissibility of this particular evidence, in a motion to the full commission, so that the commission may have the facts before them. R. 541)

"Exam. Carter: Well, for instance, you read in the record, the titles of certain exhibits. If you want to give some kind of a designation to those titles, for your own convenience and future reference, I will permit you to do that. In other words, if you have the first Sioux City Exhibit, say, the Articles of Incorporation, you might refer to it as Sioux City Exhibit A. If the second one was some other paper you might say that that was Sioux City Exhibit B.

"Mr. Gladson: Yes.

"Exam. Carter: *And I will allow that designation to appear in the record.* Now, is that clear?

"Mr. Gladson: Now, let me ask you, Mr. Examiner, will

off the record and this proposal was accepted[1] but never taken advantage of by appellant.

As stated above, counsel for appellant asked what disposition of the excluded exhibits should be made, and indicated his intention to mail them to the Commission. (R. 549) He was instructed by the Examiner: "You will mail them to the Commission with any petition that you might desire to file". (R. 549) At the instance of counsel for appellant, this understanding as to the marking of the exhibits was again confirmed on the record

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you allow, after they have been so marked, an offer to admit those particular exhibits?

"Exam. Carter: What did he say there?

(Mr. Gladson's remarks read.)

"Mr. Gladson: In other words, will you allow us to offer them in evidence?

"Exam. Carter: I have ruled that they were inadmissible. I have ruled that testimony of that character was inadmissible and, of course, if you want me to make the ruling over again, I will make the ruling over again. I have already made the ruling. That is clear to me." (R. 548-549; italics ours)

[1] "Mr. Gladson: Now, one of my associates suggests that I ask this question: If we take advantage of the Examiner's offer to put certain private marks on these exhibits at Sioux City and these other Yards, will they be received as marked exhibits by the Examiner, or will we mail them to the Commission, or just what disposition—

"Exam. Carter: They will not be received by the Examiner. *You will mail them to the Commission with any petition that you might desire to file.*

"Mr. Gladson: Then, I am wondering if we might have it understood with Mr. Smith, that instead of taking up the time of the Examiner, that Mr. McDougall and Mr. Hamilton, our associates, might get together and identify these exhibits so that they may be mailed to the Commission in connection with our petition.

"Mr. Smith: Mr. McDougall will be available to participate in that exercise and will be glad to join with

before the close of the hearings.[1] But when appellant, having rejected the Examiner's offer to mark the exhibits and to show their designation upon the record, filed its petition with the Commission to reopen the case and to require the admission of the excluded evidence (which if granted would have required the multiplication of the testimony and exhibits and the issue more than a hundredfold) it did not submit the questioned exhibits. (R. 164-199) Neither did it ask the Commission's permission to file them in connection with the petition. It merely offered to submit them "if the Commission so desires". (R. 164, 198-199) At the same time it admitted in the petition that it had stated the nature and purpose of the evidence and further

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Mr. Hamilton in putting his initials on these documents that their identity in that way will be fixed. It is my understanding of what you have in mind, Mr. Gladson, that all of these documents to which you now refer and suggest, that Mr. McDougall and Mr. Hamilton identify, are documents relating to the situation at these Stock Yards other than Chicago; is that a correct understanding?

"Mr. Gladson: That is a correct understanding, and cover most, if not all, of the posted markets in the country.

"Mr. Smith: Other than Chicago.

"Mr. Gladson: Other than Chicago." (R. 549-550). (Italics ours.)

[1] "Mr. Fulbright: Pardon me, I want to make a statement for the benefit of the record, and perhaps Mr. Smith would want to hear it before he proceeds. The Respondent wishes the record to show that respondent will proceed as promptly as practicable to file a motion with the Commission appealing from the ruling of the Examiner with respect to the testimony and the exhibits which were not admitted in evidence, particularly testimony and exhibits pertaining to the various other markets, and will refer to the exhibits which the record shows the Examiner has permitted us to designate by some appropriate lettering, which service will be performed by Counsel for the respective parties. We expect to follow that through, Mr. Examiner, as promptly as we can." (R. 570)

said that: "The nature as well as the purposes of the rejected evidence is shown further at many other places in the petition". (R. 164, 198) Since the nature and purposes of the evidence had been disclosed both on the record at the time of the hearings and in this petition, there was no need for the physical incorporation in the record of the detailed exhibits or for any further elaboration as to their contents.

Appellant has cited no authority that a party is denied a fair hearing if, having fully disclosed the nature and purpose of evidence which has been rejected, the party is denied leave to continue to elaborate the offer of proof by putting it in question and answer form, with the result that the proffered showing is incorporated in the record precisely in the form in which it would have appeared if received in evidence. Since the nature and purpose of all the evidence had been disclosed and its relevance thoroughly discussed, such a procedure would have been utterly useless. The District Court committed no error in refusing to enjoin the enforcement of the Commission's order on this ground.

Following the argument in support of its contention that the Commission denied appellant a fair hearing by arbitrarily refusing to receive the evidence just discussed, appellant devotes several pages of its brief (pp. 117-119) to criticism of the Commission and its Examiner in respect to evidence which was received at the hearing including certain information elicited from appellant's Vice President and General Manager. The acceptance of such evidence is not specified as error and the only purpose of appellant's comment upon it, presumably, is an effort to give color to its contention that the Commission was arbitrary in its exclusion of the evidence sought to be introduced by appellant. Certain of appellant's statements in

this connection could be so easily misunderstood that we should comment upon them briefly.

As an extreme example of the arbitrary conduct of the hearing, of which it complains, appellant states that inquiry was made "whether appellant was sponsoring proposed legislation in Congress". (Br. 117) The appellant's General Manager, the witness Henkle, agreed on cross-examination that he had testified at the first hearing that if the appellant succeeded in withdrawing its tariffs from the Commission, the fixing of its charges for the loading and unloading service would be a matter of barter and trade. The witness then volunteered the statement: "but in the development of our plans it may well be that the charges will all be subject to the Secretary of Agriculture * * *." (R. 313) The purpose of the hearing was to determine whether the appellant was subject to the Interstate Commerce Act, and the Commission being advised that the Yard and Transit Company was developing plans which might cause it to be subject to the jurisdiction of a different administrative tribunal, it was certainly proper, and we believe, the duty of the presiding Examiner, to ascertain the nature of the plans. After the witness had made a number of inconclusive replies to questions as to the nature of these plans, the Examiner inquired: "When you say plans, do you have in mind any legislation that has been introduced this summer?" (R. 314) The Examiner referred to proposed legislation before the Congress which provided in specific terms for transferring the jurisdiction of the Commission over the loading and unloading service to the Secretary of Agriculture. The public record of the hearings on this bill [1] show that representatives of the appellant did appear before the Senate Committee on Agriculture and Forestry in support of

[1] 75th Congress, S. 2129, H. R. 6732.

that legislation which, however, was never reported out by the Committee.

The Examiner is criticised also for eliciting from appellant's General Manager the information that appellant seeks to free itself from the regulation of the Commission in order to increase its charges from $1.25 to $4.25 per car. (Appellant's brief, p. 118) It was proper for the Examiner, we submit, to ascertain the relation of the appellant's effort to free itself from regulation, to one of the underlying purposes of the Interstate Commerce Act, namely, that "all charges made for service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable," (Sec. 1 (5)) as determined by the Commission pursuant to the provisions of Section 15 of the Act.

The same witness thus testified that appellant was seeking to escape the jurisdiction of the Commission so that it could make this increase in its rates (R. 311), and that it was developing plans under which it "may well be that the charges [for the loading and unloading service] will all be subject to the Secretary of Agriculture." (R. 313) The vital interest which of necessity the trunk line railroads (the protestants) have in the measure of this charge caused them to inquire from the witness why the appellant would prefer to file its proposed higher rate with the Secretary. It was in connection with this inquiry that it was developed that the Secretary has never fixed any of the rates charged by the appellant for any of the stockyard services performed by it at Chicago. (R. 324, 325)

For the same general purpose appellant quotes (Appellant's brief, p. 115) certain statements of the Examiner and counsel which are said to be "enlightening". The excerpt would be more truly enlightening if more had been quoted.

As will be found from reading the entire discussion (R. 565, 566) of which that quoted is a part, the colloquy ensued when it was discovered that certain data repeatedly held inadmissible had nevertheless been physically incorporated in the record.

We respectfully submit that the decree of the District Court which dismissed the appellant's bill of complaint should be affirmed.

Respectfully submitted,

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
D. ROBERT THOMAS, JR.,
Counsel for railroad intervenors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 40

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF NATIONAL LIVE-STOCK MARKETING ASSOCIATION, INTERVENER.

LEE J. QUASEY,
Commerce Counsel for Intervener.

THE DUNLOP-WARREN PRINTING COMPANY, 218 WEST JACKSON, CHICAGO

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF NATIONAL LIVE STOCK MARKETING ASSOCIATION, INTERVENER.

PRELIMINARY STATEMENT.

This brief is filed by the National Live Stock Marketing Association. The Association is a national organization composed of 21 producer owned and producer controlled cooperative live-stock marketing associations, with an aggregate membership of approximately 300,000 farmers and ranchers who are engaged in the production and feed-

ing of live stock. The member cooperative associations are broadly distributed over the country and have their central operating points on practically all the major public live-stock markets, including Chicago, Illinois. (R. 571.)

The Association by its nature is vitally interested in the welfare of the live stock industry and particularly in matters in connection with the transportation and marketing of live stock. The loading and unloading of live-stock shipments moving by rail from and to public live stock markets is declared by Congress (Section 15 (5)) to be a transportation service. The appellant is compensated for that service out of the line-haul charge which the shippers are required to pay. The service is an inseparable part of the transportation service and the shippers desire the Commission to retain its jurisdiction over the appellant in regard to that service.

STATEMENT OF FACTS AND STATUTES INVOLVED.

For the purpose of this brief intervener herein adopts the statements found in the brief for the United States with respect to the opinion of the District Court below, the decision of the Interstate Commerce Commission, the issues and statutes involved.

SUMMARY OF ARGUMENT.

I.

Appellant is subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Interstate Commerce Act and is not subject to the jurisdiction of the Secretary of Agriculture under the provisions of the Packers and Stockyards Act, 1921, with respect to the unloading and loading of live stock shipments by rail to and from the public stock yards at Chicago, Illinois.

Provisions of the Interstate Commerce Act and the Packers and Stockyards Act clearly show that Congress intended that the Commission should have exclusive jurisdiction over transportation services and charges and the Secretary to have exclusive jurisdiction over stock yard services and charges. Both the Commission and the Secretary have consistently given effect to this intent.

Transportation wholly by railroad does not end until the live stock is unloaded into suitable pens and stock yard services do not begin until the unloading service ends. (*Denver Union Stock Yards Company* v. *United States of America and the Secretary of Agriculture*, 304 U. S. 470, decided in 1938.)

II.

In its decision in 1912 this Court held the appellant to be a common carrier by railroad with respect to the loading and unloading services performed by it, and that service has not been effected in any manner by the 1922 lease which did not cover any of the facilities used by appellant in the loading and unloading of the live stock. Appellant did not ask the Commission to relieve it of its common carrier status in the lease proceedings and the

Commission did not do so. It was not until 11 years after the execution of the lease that the appellant first contended that the lease had relieved it of its status as a common carrier.

The contention was first advanced by appellant in *Atchison, T. & S. F. Ry. Co., et al.* v. *United States* (the Hygrade Case), 295 U. S. 193, and specifically overruled by this Court.

III.

Appellant is seeking to free itself from the jurisdiction of the Commission in order to make an increase in its charges for the loading and unloading services. Appellant made an unauthorized increase in its charge for these services prior to 1920, and as a direct result of that action, the live stock producers and shippers secured the enactment of Section 15 (5) as a part of the Transportation Act of 1920. The Commission has correctly found that the remedial purpose of that legislation would be defeated by release of appellant from the jurisdiction of the Commission.

ARGUMENT.

I.

APPELLANT IS SUBJECT TO THE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND NOT SUBJECT TO THE PROVISIONS OF THE PACKERS AND STOCKYARDS ACT, 1921, WITH RESPECT TO THE UNLOADING AND LOADING OF LIVE STOCK SHIPMENTS BY RAIL.

Appellant urges in justification of the cancellation of its tariffs on file with the Interstate Commerce Commission with reference to the unloading and loading of live-stock shipments by rail at the Union Stock Yards, Chicago, that it is subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act.

While the Packers and Stockyards Act conferred powers upon the Secretary of Agriculture for the regulation of stockyard services, we wish to point out that Section 15 (5) of the Interstate Commerce Act, passed by Congress in 1920, provided that transportation wholly by railroad of ordinary live stock destined to public stock yards shall include, among other things, delivery at public stock yards of inbound shipments into suitable pens without extra charge therefor to the shipper.

Section 15 (5) of the Interstate Commerce Act provides:

> "Transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stock yards shall include all necessary service of unloading and reloading en route, delivery at public stock yards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations."

The Commission in its report herein (R. 22) in commenting upon the circumstances and purposes of this section states as follows:

> "The enactment of this paragraph resulted from respondent's action in 1917 in increasing its unloading charge and the refusal of the line-haul carriers to absorb the increase, with the result that the additional charges imposed by respondent were collected from the consignees. The practices of carriers and stockyards of adding terminal charges to the scheduled railroad rates had been bitterly complained of by live-stock shippers, and prior to the enactment of the above paragraph Congress was fully informed of the status of public stockyards and the services which they performed. Senator Cummins, chairman of the interstate commerce committee, states that the purpose of the amendment was to require that the series of services rendered in connection with the transportation be performed for a single scheduled rate, and

> when the conference report on the bill in its final form was made, the House managers stated that the purpose of the amendment was to provide that the through rates in livestock should include unloading and other incidental charges. The legislative history of the paragraph indicates clearly the single purpose to give the Commission authority over services rendered and facilities used in the delivery of livestock at public stockyards."

Thus the services performed by the appellant in connection with the unloading and loading of rail shipments of live stock are included in "transportation wholly by railroad" under provisions of the Interstate Commerce Act.

This court held at the time of its first decision in *United States v. Union Stockyard & Transit Company of Chicago, et al.*, 226 U. S. 286 (1912) that the services performed and facilities furnished by the appellant were an inseparable part of the railroad transportation.

Section 15 (5) of the Interstate Commerce Act providing that the unloading and loading of rail shipments of live stock be performed by the carriers without additional charge was passed in 1920. The Packers and Stockyards Act, 1921, passed about a year later, which conferred certain powers upon the Secretary of Agriculture with respect to "stockyard owners" and "stockyard services," provides as follows:

> "Sec. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

In view of the plain terms of Sec. 406 there is no room for the contention that the Packers and Stockyards Act gives the Secretary jurisdiction over loading and unloading services. The Interstate Commerce Commission had been exercising jurisdiction over the appellant with respect to loading and unloading of live-stock shipments by rail

pursuant to the decision of this court in 1912, for about nine years prior to the time the Packers and Stockyards Act was passed, and enactment of Sec. 15 (5) came only about a year prior to passage of the Packers and Stockyards Act.

Therefore, the provisions in Section 406 of the Packers and Stockyards Act must be considered as applicable to the jurisdiction vested in the Commission at the time it was passed.

As shown by the express provisions of the Packers and Stockyards Act, Congress intended that the jurisdiction of the Secretary of Agriculture, under the Act, should not overlap or affect the power or jurisdiction of the Interstate Commerce Commission. The action of the Secretary in proceedings concerning public stock yards has consistently adhered to this limitation, and there has never been a case where there has been any conflict over the limit of jurisdiction between the Interstate Commerce Commission on the one hand and the Secretary of Agriculture on the other. This position by the Secretary was approved by this court in *Denver Union Stockyards Company* v. *United States of America and the Secretary of Agriculture*, 304 U. S. 470, decided May 31, 1938. This was a proceeding initiated by the Secretary in which after extended investigation, taking of much evidence and full hearing, the Secretary issued an order establishing a rate base and prescribed maximum rates to be charged by the Denver Union Stockyards Co. for stockyard services rendered by it. The stock yard company filed a bill to set aside the order of the Secretary. This Court sustained the order of the District Court dismissing the bill stating in part as follows:

> "Appellant's activities are not confined to services covered by the order. It unloads and loads live stock from and into cars of railroads serving the yard, and receives from the carriers compensation not regulated by the Secretary."

From this it appears that the situation in that case is very similar to the situation of the appellant herein. The statement of the court with respect to trackage and unloading facilities is particularly significant where in upholding the Secretary in the exclusion of such facilities on the grounds that they were not used for performance of any stock yard service, the court said:

> "The Secretary appraised that property at $177,108. He excluded it as not used for performance of any stockyard service. Appellant leases the trackage to railroad carriers for substantial rentals. It does not claim that exclusion of that part of the item is confiscatory and fails to show it prejudicial. It follows that the court did not err in upholding the Secretary's determination. The unloading and loading facilities include ways between docks and the pens where the stockyard services are rendered. Appellant uses these facilities to unload and load live stock. That is a service for which the carriers pay appellant. Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, 1387, 55 S. Ct. 748. The court rightly refused to disturb the Secretary's ruling as to these facilities."

This decision again establishes that stockyard services over which the Secretary has jurisdiction under the Packers and Stockyards Act do not commence until unloading ends and they end when the loading begins. In view of the decision of the court in the Denver case it follows that the decision of the Commission here must likewise be upheld because under it the Commission would exercise jurisdiction only to the point where transportation ends, as was originally held by this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 134, decided in 1891, and again in *A. T. & S. F. Ry. Co.* v. *U. S.*, 295 U. S. 193, where the court at page 201 stated:

> "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now re-

quired by Sec. 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends."

From this it is clear that the Interstate Commerce Commission has jurisdiction over the unloading and loading of live stock at public live-stock markets, that its jurisdiction does not end until the live stock is unloaded into suitable pens and that of the Secretary does not begin until the unloading ends.

Therefore, the Interstate Commerce Commission properly held that its jurisdiction over appellant's charges to the place where transportation ends was not taken away by the enactment of the Packers and Stockyards Act, 1921.

II.

THE LEASE ENTERED INTO BY APPELLANT IN 1922, WITH RESPECT TO CERTAIN OF ITS RAILROAD PROPERTY, DID NOT AFFECT EITHER THE FACILITIES OR SERVICES IN CONNECTION WITH THE LOADING AND UNLOADING OF RAIL SHIPMENTS OF LIVE STOCK AT ITS STOCK YARDS.

Appellant contends that it is not now and has not been since 1922 a common carrier subject to the Interstate Commerce Act, that at that time it joined in a lease in which the Chicago Junction Railway subleased the railroad properties held by it under a lease from the appellant to the Chicago River and Indiana Railway Company for a period of 99 years and thereafter, at the option of the lessee in perpetuity, the said lease providing for an annual rental of $2,000,000. This was authorized subject to certain conditions in *Chicago Junction Case*, (71 I. C. C. 631; 150 I. C. C. 32.)

The appellant was organized in 1865 as the Union Stock Yard & Transit Company under a special charter from the State of Illinois, which granted to it the power to build, own and operate a railroad and a stock yard, and the power of eminent domain.

The charter provided, among other things, that the company—

> "Shall construct a railway, with one or more tracks as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside the City of Chicago, the same with the tracks of all railroads which terminate in Chicago * * * and to make connections with such suitable sidetracks, switches and connections as to enable all the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks * * * for the purposes aforesaid * * *." (*Live Stock, Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 331.)

Pursuant to the exercise of its charter power the appellant acquired real estate, constructed a public stock yard and approximately 300 miles of railroad track connecting with trunk lines entering Chicago.

It is to be observed that it was not until after a lapse of 11 years following the making of the 1922 lease that the appellant raised the contention that it was no longer a common carrier by virtue of the said lease.

In 1923 appellant filed schedules with the Interstate Commerce Commission proposing to increase its charges for loading and unloading double deck cars of ordinary live stock from $1.00 to $2.00. The schedules were suspended by the Commission and in the subsequent proceeding the Commission found that the proposed increased charges had not been justified. (*Loading and Unloading Live Stock at Chicago, Illinois*, 83 I. C. C. 248.) Later appellant filed a supplement to its tariff proposing to in-

crease the charge to $1.25, which was not protested and became effective December 14, 1934. (*Live Stock Loaded and Unloaded at Chicago*, 213 I. C. C. 330.) It was not until 1933 when the so-called Hygrade Case, *Supra* (*A. T. & S. F. Ry.* v. *United States*, 295 U. S. 193), came before the Commission, that the appellant contended for the first time, before the Commission and the Court, precisely as it does here, that the effect of the 1922 lease was to divest it of its status as a common carrier. This court overruled that contention (295 U. S. 193, 201).

Section 1 (3) of the Interstate Commerce Act defines the terms "railroad" and "transportation" as follows:

> "The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.
>
> "The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The services of loading and unloading live stock by appellant are therefore, terminal services with respect to this traffic and are just as indispensable to a complete transportation service by railroad as the movement of the cars of live stock to the unloading chutes. The handling of the live stock by appellant is the same today as it has always

been. The line-haul carriers bring the live stock to the unloading docks of the appellant by use of their own power and the appellant does the unloading today exactly as it has always done.

In its report herein the Commission makes the following finding:

> "These services consisted and consist today of the unloading of live stock from railroad cars into unloading pens located on respondent's property and of the loading of live stock from loading pens into railroad cars. Such services have always been performed by respondent's employees, and under respondent's rules the service cannot be performed by persons who are not employed by respondent. The live stock is now, and, except for a period early in respondent's history, always has been, hauled by the trunk lines to the platforms where respondent furnishes the services and facilities to complete the transportation.
>
> "The unloading and loading of live stock at respondent's yards and the furnishing of the facilities is an inseparable part of the interstate railroad transportation. Respondent not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of live stock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery. Having attained this status, and thereby having rendered impracticable the construction and maintenance of separate live stock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common-carrier functions to another corporation." (R. 34, 36.)

The status of appellant as a common carrier subject to the Act has been determined by this Court and the Commission in the following cases:

> "*United States* v. *Union Stock Yard & T. Co. of Chicago*, 226 U. S. 286;

Adams v. *Mills*, 286 U. S. 397;
Atchison, T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193;
Live Stock Loading and Unloading Charges, 52 I. C. C. 209, 58 I. C. C. 164;
Live Stock Loading and Unloading Charges, 61 I. C. C. 223;
Loading and Unloading Live Stock at Chicago, 83 I. C. C. 248;
Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330;
Livestock to or From Union Stock Yards, Chicago, 222 I. C. C. 765."

Therefore the appellant is a common carrier subject to the Interstate Commerce Act, and the lease entered into by appellant in no way affected the manner of handling of the livestock by appellant and does not, we believe, affect the status of the yard company with respect to that service or deprive the Commission of jurisdiction which it has exercised continuously since the decision of this court in 226 U. S. 286, *supra*, decided in 1912.

III.

RELEASE OF APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DEFEAT THE REMEDIAL PURPOSE OF SECTION 15 (5) OF THE INTERSTATE COMMERCE ACT.

The Commission correctly states in its report that to release the appellant from the jurisdiction of the Commission would defeat the remedial purpose of paragraph 5 of Section 15 of the Act. That provision of the law was enacted by Congress as a part of the Transportation Act of 1920, primarily in response to urgent requests of associations of live-stock producers and shippers. The American National Live Stock Association, the National Wool

Growers' Association, the Texas Southwestern Cattle Raisers' Association, and the National Live Stock Marketing Association intervened in this proceeding before the Commission in opposition to the appellant's efforts to relieve itself from jurisdiction of the Commission and in so doing to defeat the remedial purpose of Section 15 (5) of the Act.

In the report here before the Court the Commission states:

> "The enactment of this paragraph (Sec. 15(5)) resulted from respondent's action in 1917 in increasing its unloading charge and the refusal of the line-haul carriers to absorb the increase, with the result that the additional charges imposed by respondent were collected from the consignees. The practices of carriers and stockyards of adding terminal charges to the scheduled railroad rates had been bitterly complained of by livestock shippers, and prior to the enactment of the above paragraph Congress was fully informed of the status of public stockyards and the services which they performed. Senator Cummins, Chairman of the Interstate Commerce Committee, stated that the purpose of the amendment was to require that the series of services rendered in connection with the transportation be performed for a single scheduled rate, and when the conference report on the bill in its final form was made, the House managers stated that the purpose of the amendment was to provide that the through rates on livestock should include unloading and other incidental charges. The legislative history of the paragraph indicates clearly the single purpose to give the Commission authority over services rendered and facilities used in the delivery of livestock at public stockyards." (R. 37).
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>
> "Since respondent performs the service as common carriage, there is no reason, from a legal standpoint, why, as so performed, Congress' declaration that it is part of the railroad transportation should not still be given effect. There is a great deal of reason for so doing from the standpoint of giving full effect to the remedial purpose of section 15(5)." (R. 38).

Appellant's purpose is to release itself from the Commission's jurisdiction, and then to establish a higher charge for the transportation services which it performs. (R. 311). Appellant followed a very similar course of action in 1917 and the enactment of paragraph (5) of Section 15 was secured by the shippers for the very purpose of dealing with the situation so created. So history repeats itself.

The appellant filed its tariff with the Commission as required by the Supreme Court in 1913. In 1917 it filed an amended tariff to increase its charge for the delivery service from 25 to 50 cents. The Commission suspended the tariff and conducted a hearing in the matter and the shippers appeared at that hearing in opposition to the proposed increase. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209. To circumvent the suspension of the proposed increase the appellant then took action to make the increase effective without the necessity of justifying it before the Commission. Its method of accomplishing this was to file a notice cancelling its tariffs, exactly the course which it has again followed here about twenty years later. Furthermore, then, exactly as now, the appellant contended that it had divested itself of its common carrier status by a change which had been made in its lease of various facilities, other than those employed in the loading and unloading service.

The Commission's power to suspend a tariff publication was then and is now limited to seven months, and its suspension of appellant's cancellation notice expired during the course of the investigation into the proposed increase, with the result that the appellant accomplished the withdrawal of its tariff from the Commission's files and taking advantage of that fact and without tariff authority collected from the shippers an additional charge of 25 cents a car on each of the thousands of cars of

livestock loaded and unloaded by it. It did that in defiance of the decision of this Court in *United States* v. *Union Stock Yard and Transit Company, supra,* 226 U. S. 286. The shippers were then before the Commission seeking to obtain an award of reparation for the amount thus collected, but the Commission had not yet made its award of reparation, which it did later in *Livestock Loaded and Unloaded,* 58 I. C. C. 164, July 15, 1920. The litigation which finally culminated in the decision of this court in *Adams* v. *Mills,* 286 U. S. 397, (1932), condemning the action of the appellant, still had twelve years to run. This Court had already held appellant to be subject to the Interstate Commerce Act under the terms of Section 1 and later it reaffirmed that holding. Nevertheless, the shippers had been forced to pay appellant large sums not authorized by the Commission.

With a view to meeting this situation by legislation as well as by action in the courts under the existing law, the national live stock associations and other live stock interests appeared before the Congress and urged the adoption of the amendment which was enacted as paragraph 5 of Section 15 of the Interstate Commerce Act.

As the Commission has found, the purpose of that legislation would be defeated by removing the appellant's charge for the unloading and loading service from the control of the Commission. That the necessary unloading and loading services, performed by the appellant, are an integral part of the railroad transportation and the charge for these services is one of the elements of expense which is reflected in the measure of the line-haul rate assessed against the shippers. The report of the Commission correctly states:

> "The fact that the railroads must proffer the (loading and unloading) service as a part of their interstate railroad transportation, absorbing any

charge exacted therefor, is inescapable. If respondent doubles its present charge of $1.25, it must still be absorbed. Either the railroads must bear the increase or pass it on to the shippers in an increased through rate.' (R. 38).

So long as the Commission has jurisdiction over the appellant, the amount assessed against the shippers for the loading and unloading services will be no more than reasonable. This is the very protection which the explicit terms of Section 15(5) were intended to guarantee. On the other hand it would reverse the decision of this Court holding appellant to be a common carrier under Section 1 of the Act, to permit it again to withdraw its tariffs, and again to use its monopoly of these services and its possession of the live stock to impose a charge of its own choosing, free from the control of the Commission, exactly as it did in 1917, and would nullify the purpose of Section 15(5) which was directed at the very evil with which the shippers are again confronted.

The Commission is right that if the remedial purpose of the Congress is to be given effect, the Commission must control appellant's charges for the loading and unloading services which are an inseparable part of "transportation by railroad" within the provisions of the Interstate Commerce Act.

Wherefore it is urged that the decision below in which the District Court dismissed the appellant's bill of complaint should be affirmed.

Respectfully submitted,

LEE J. QUASEY,
Commerce Counsel for Intervener.

pp. 1-2,

SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1939.

The Union Stock Yard and Transit Company of Chicago, Appellant,
vs.
The United States of America, Interstate Commerce Commission, et al.

Appeal from the District Court of the United States for the Northern District of Illinois.

[December 4, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The principal question for decision upon this appeal is whether, in the services performed by appellant in loading and unloading livestock at its stockyards in Chicago, and specified by its tariffs filed with the Interstate Commerce Commission, it is a common carrier subject to the Interstate Commerce Act, 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C., §§ 1-27.

The case comes here on appeal from the final decree of a district court of three judges,[1] dismissing appellant's suit to set aside an order of the Interstate Commerce Commission, which directed the cancellation of appellant's supplemental schedule proposing cancellation of its rate schedules previously filed with the Commission. *Cancellation of Livestock Services*, 227 I. C. C. 710. Appellant here, as below, assails the Commission's order on the ground that in performing the scheduled services appellant is not within the jurisdiction of the Commission as defined by the Interstate Commerce Act.

As appears in the Commission's report, appellant was incorporated in 1865 with authority to build and operate a railroad and a stockyard, and with power of eminent domain. Acting under its charter it constructed a stockyard in Chicago and approximately three hundred miles of railroad tracks, consisting of a main line connecting with the trunk lines entering Chicago and switches to various industries located adjacent to its tracks.

Prior to 1912 it had tried various methods of operating its tracks and stockyards. At that time it did not control any of its railroad

[1] §§ 210 and 238(4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 983, 28 U. S. C., §§ 47a, 345.

properties other than platforms and facilities for loading and unloading at its yard. The Chicago Junction Railway Co., which, with appellant, was controlled by a single holding company, operated the railroad under a fifty-year lease, paying to appellant as rental two-thirds of its net profits. In that year the United States brought suit to restrain appellant and the Junction Company from further operations in interstate commerce until they filed tariffs as required by § 6 of the Interstate Commerce Act. The litigation resulted in the decision of this Court that both were common carriers subject to the Act. *United States* v. *Union Stock Yards and Transit Co.*, 226 U. S. 286. Appellant then filed a rate schedule with the Commission specifying its charges for loading and unloading all rail-borne livestock, and continued its practice of performing services in loading and unloading from and to its livestock pens for the trunk line railroads, charging them the scheduled rates for the service.

In the following year the Junction Company lease was cancelled and a new one executed, under which appellant leased in perpetuity all of its railroad facilities, except those used for loading and unloading livestock, at an annual rental of $600,000 in lieu of a share of the profits. This was followed in 1917 by an attempt by the stockyard to charge shippers an additional amount for the loading and unloading service which resulted in a reparation award by the Commission, sustained in *Adams* v. *Mills*, 286 U. S. 397. In the same year appellant sought to cancel its tariffs on the ground that by reason of the change in the lease it was no longer a common carrier. This contention was rejected by the Commission. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; 58 I. C. C. 164.

In 1922 the Junction Company, with the approval of the Commission, *Chicago Junction Case*, 71 I. C. C. 631, 150 I. C. C. 32, sublet the road for ninety-nine years, with a renewal option, to the Chicago River & Indiana Railroad Co., whose capital stock was acquired by the New York Central Railroad Company. A renewed attempt by the stockyard to cancel its tariffs failed in 1935. 213 I. C. C. 330 and its 1937 repetition resulted in the like order of the Commission, which is the subject of the present suit.

By ceasing to operate or control its railroad directly or indirectly appellant has restricted its transportation service to the loading or unloading of livestock as specified in its tariff. It owns the platforms and chutes which are the necessary and only means of loading and unloading at its yard to and from which the livestock is shipped

interstate by rail. For this service it charges the railroads the scheduled rates. Loading and unloading are included in the transportation service rendered by the railroads to shippers, the charge for it to shippers being covered by the line-haul tariffs. The Commission found that appellant's yard is the principal railroad terminal in Chicago for the receipt of livestock in carload lots, and that appellant holds itself out to the public as performing the loading and unloading service and permits it to be performed by no other.

Appellant contends that having divested itself of all control and participation in the operation of its railroad it is no longer within the jurisdiction of the Commission over "common carriers by railroad", conferred by the Interstate Commerce Act, but is subject to regulation by the Secretary of Agriculture, under the Packers and Stockyards Act of 1921, 42 Stat. 159, 7 U. S. C., §§ 181-229.

By § 305 of that Act rates and charges for stockyard services furnished at a stockyard or by a stockyard owner are required to be just and reasonable. And by §§ 309, 310, the Secretary is given authority to regulate such rates. By § 301 stockyard services are defined as "services or facilities furnished at a stockyard in connection with the receiving, buying or selling . . . . marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock". It will be noted that the loading and unloading of livestock are not specifically included in the definition of stockyard services. Further, an important exception to the broad authority of the Secretary is made by § 406, which provides: "Nothing in this chapter shall affect the power or the jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission". We accordingly turn to the provisions of the Interstate Commerce Act to determine the extent of the exception.

Section 6(1) of the Interstate Commerce Act provides that a common carrier subject to the provisions of the sections presently to be mentioned, where no joint rate is involved, shall file schedules of rates showing "the separately established rates . . . applied to the through transportation" and requires that the rate schedules shall "state separately all terminal charges . . . and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such

aforesaid rates . . . or the value of the service rendered to the passenger, shipper, or consignee."

Section 1(1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad . . . " Section 1(3) provides that the term railroad shall include ". . . all the road in use by any common carrier operating a railroad . . . all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation . . . of . . . persons or property . . . including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property. It defines the term "transportation" as including "locomotives, cars, . . . and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery elevation and transfer in transit . . . and handling of property transported". Section 15(5) provides, "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service or unloading and reloading enroute, delivery at public stockyards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner . . . "

Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136. The same rule has been repeatedly applied since the statute was adopted. *Erie R. Co.* v. *Shuart*, 250 U. S. 465, 468; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193, 198 and cases cited; *Denver Stock Yards Company* v. *United States*, 304 U. S. 470; 2 Hutchison, Carriers, 3d ed. §510. Appellant is thus engaged in the performance of a railroad transportation service and provides railroad "terminal facilities" and services. It is a "carrier" engaged in "transportation of property wholly by railroad" as those terms are defined by the words of the statute.

That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills*, *supra*, 409,

and also in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States, supra.* There the Commission's order directing the discontinuance of appellant's yardage charge to consignees was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.

The statute, it is true, does not purport to say when one who is a railroad carrier because engaged in furnishing railroad terminal facilities and services, is to be deemed a "common carrier". But that question was put at rest in *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296. There a local terminal company rendering terminal services as the agent of numerous rail carriers, was held to be engaged in a public or common calling, and hence to be a common carrier within the meaning of the Hours of Service Act, 34 Stat. 1415, which is applicable to any common carrier by railroad engaged in interstate commerce. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *United States* v. *California,* 297 U. S. 175, 181; *United States* v. *Sioux City Stockyards Co.,* 162 Fed. 556.

It is not important, as appellant seems to think, that, as an incident to the service it renders to shippers and to the line-haul carriers, it acts as agent of the latter. The character of the service, in its relation to the public, determines whether the calling is a public one, and a common carrier does not cease to be such merely because in rendering service to the public it acts as the agent of another. *United States* v. *Brooklyn Eastern District Terminal, supra,* 307. Connecting common carriers frequently act in that capacity for each other without losing their status as such.

Nor is it of weight that the terminal service includes no rail-haul. See *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, or that operation and control of the terminal facilities are wholly separate from those of any railroad. *United States* v. *Brooklyn Eastern District Terminal, supra,* 305. It is enough that the loading and unloading are rail transportation services performed at a railroad terminal as a common or public calling by one who, in rendering it, engages in the transportation of property by railroad within the meaning of the Act.

Ellis v. *Interstate Commerce Commission,* 237 U. S. 434, on which appellant relies, does not hold otherwise. There the Commission sought a district court order to compel the examination of witnesses

in a proceeding, instituted by the Commission of its own motion, for the investigation of a corporation which leased refrigerator cars to shippers and railroads and maintained icing plants at which it iced the cars, the railroad paying for the icing service. There was no allegation or proof that the corporation was engaged in a common calling or held itself out as ready or willing to supply cars or services on reasonable request. In holding that the case was not an appropriate one for the relief sought because the company was not within the jurisdiction of the Commission, the Court said, p. 443: "It is true that the definition of transportation in § 1 of the Act includes such instrumentalities as the Armour car lines lets to the railroads, but the definition is a preliminary to the requirement that the carrier shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers contrary to the truth".

This Court has since recognized that loading and unloading services such as are here involved are common carrier services placed under the authority of the Commission by the Interstate Commerce Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States, supra; Denver Stock Yards Company* v. *United States, supra,* 477. And unless the restriction of § 406 of the Packers and Stockyards Act upon the authority of the Secretary of Agriculture in favor of that of the Commission refers to such services, the purpose of the section is not apparent. None other is suggested. See *Atchison, Topeka & Santa Fe Ry. Company* v. *United States, supra,* 199. As we think the statute plainly places appellant's loading and unloading facilities and services under the authority of the Commission, they are withdrawn from the jurisdiction of the Secretary of Agriculture by the terms of § 406 of the Packers and Stockyards Act,[2] and we find it unnecessary to consider the question, much

[2] If this were doubtful, doubt would be removed by the legislative history. S. 3944, 66th Congress, in providing a Federal Livestock Commission to regulate packers and stockyards did not contain such a saving clause. The House Committee on Agriculture proposed a substitute bill giving control of the stockyards to the Interstate Commerce Commission because "the Commission already has control over transportation of cattle, which does not end until they are unloaded at the yards. . . ." H. Rept. 1297, 66th Cong., 3rd Sess., p. 9.

In the 67th Congress the House Committee on Agriculture proposed the bill substantially in the form finally adopted as the Packers and Stockyards Act, containing the saving clause in favor of the Commerce Commission. The Chairman in introducing the bill in the House said: "It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of livestock and live-stock products in interstate commerce;

argued at the Bar, whether the services could be more conveniently and advantageously regulated by the one administrative agency than by the other.

Appellant asks that the order be set aside for want of the "full hearing" by the Commission, required by § 15(7) of the Interstate Commerce Act. In the course of the hearings before the Commission appellant offered in a variety of ways to prove the conditions prevailing at stockyards other than appellant's, and that the Commission had not asserted jurisdiction over loading and unloading services performed at those yards. Appellant states that the evidence would have shown that there are one hundred and thirty-five other stockyards in the United States under regulation by the Secretary of Agriculture,[3] which perform loading and unloading services, for which the railroads pay, under conditions similar to those in the Chicago yard; that although, to the knowledge of the Commission, this has been the case for many years, it has not asserted its jurisdiction over any of these yards. This, it is argued, would have established a practical construction of the statute by the Commission, relevant and material to the inquiry because of the rule that a settled or uniform administrative construction of a doubtful statute is of weight in determining its meaning. *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; *The Pocket Veto Case*, 279 U. S. 655, 688, 689; *Louisville & Nashville R. R. Company* v. *United States*, 282 U. S. 740. The exclusion of the proffered evidence by the Commission and its alleged failure to make a proper record of the offer, it is urged, have deprived the appellant of a full hearing.

We think the record adequately shows that the Commission excluded the offered proof as appellant has characterized it here, but we conclude that the Commission was free to reject it. The issue to be resolved in the present proceeding is whether the service rendered by appellant at its Chicago stockyard brought it within

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that is the Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads." Cong. Rec., Vol. 61, Part 2, p. 1800.

[3] The Secretary has not asserted jurisdiction over the loading and unloading service at public stockyards. Secretary of Agriculture v. Denver Union Stock Yard Co., Bureau of Animal Industry Docket No. 450, p. 10 (1937); see letter to Chairman of Senate Committee on Agriculture and Forestry, Hearings on S. 2129, 75th Cong., 1st Sess., p. 6.

the jurisdiction of the Commission. To this issue the practices by others at other yards is irrelevant and their bearing on the administrative construction of the statute in the present circumstances is, we think, too remote and indecisive to compel a burdensome inquiry into collateral issues.

The Commission has consistently ruled that appellant's loading and unloading services are within its jurisdiction under conditions which appear of record to have remained unchanged since 1922. Appellant is free, as it has been throughout, to show any ruling or action taken by the Commission involving an administrative construction of the statute, although it is plain that in the face of the present record such rulings could not establish a consistent acceptance by the Commission of the construction for which appellant contends. See *United States* v. *Chicago, North Shore & Milwaukee R. R. Co.*, 288 U. S. 1; cf. *Sanford's Estate* v. *Helvering*, No. 34, October Term, 1939, decided November 6, 1939. But mere inaction, through failure of the Commission to institute proceedings under § 15(7), is not an administrative ruling and does not imply decision as to the Commission's jurisdiction. If the failure to act in the case of yards other than the present one is to be taken as an administrative construction of the statute persuasive here, we would be forced to conclude that a jurisdiction which the statute has plainly conferred either on the Secretary or the Commission, has been lost, although, with respect to this appellant, jurisdiction has been consistently asserted by the Commission, while the Secretary has as consistently remained passive. There is a practical limit to which inquiry into collateral issues may be extended in pursuit of the trivial. We think that limit was reached here.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.